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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1492

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, as Trustees, and CENTRAL TRUST COMPANY OF NEW YORK, as Trustee,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 1642 Howard St., S. F., Cal.

No. 1492

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, AS TRUSTEES, and CENTRAL TRUST COMPANY OF NEW YORK, AS TRUSTEE,

Appellants,

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INDEX.

Page

Page

United States Circuit Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to file the record thereof and to docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is enlarged and extended to and including the 15th day of August, 1907.

Dated at Los Angeles, Cal., June 8th, 1907.

ROSS,

Circuit Judge.

[Endorsed]: No. ———. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Railroad Company et al., Appellants, vs.

United States of America, Appellees. Filed June 10, 1907. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

(No. 1196 Circuit Court.)

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said appellants to file the record thereof and to docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is enlarged and extended to and including the 1st day of September, 1907.

Dated at Los Angeles, Cal., August 12th, 1907.

ROSS,

Circuit Judge.

[Endorsed]: No. ———. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Railroad Company et al., Appellants, vs. United States of America, Appellees. Order Extending Time. Filed Aug. 14, 1907. F. D. Monckton, Clerk.

[Endorsed]: No. 1492. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Railroad Company et al. vs. United States of America. Two Orders Extending Time to File Record and Docket Cause. Re-filed Aug. 17, 1907. F. D. Monckton, Clerk.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,

Complainant and Appellee,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants and Appellants.

Citation (Original).

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on June 15th, 1907, pursuant to the appeal of the hereinafter named defendants from the decree of the above-mentioned Court, rendered and entered on March 18th, 1907, in the above-entitled cause, being case No. 1114, wherein the United States is complainant and Southern Pacific Railroad Company, D. O. Mills and Homer S. King, as trustees, and Central Trust Company of New York, as trustee, are defendants, to show cause, if any there be, why the said decree should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Los Angeles, on May, 17, 1907.

ERSKINE M. ROSS,

Judge of the United States Circuit Court, Ninth Circuit, Southern District of California.

Service, by copy, of the within citation is hereby admitted May 23d, 1907.

ROBT. T. DEVLIN,

United States Attorney, Attorney for Appellee.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division.

United States vs. Southern Pacific Railroad Co., et. al. Citation. Filed May 27, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., Attorney for Defendants.

In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit.

No. ——.

THE UNITED STATES,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California:

The United States, by the Attorney General thereof, brings this, its bill of complaint, against the Southern Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of California, residing therein, D. O. Mills and Homer S. King, trustees, residing in California, and the Central Trust Company of New York, trustee, a corporation organized and existing

under and by virtue of the laws of the State of New York, residing in New York.

And thereupon your orator complains and shows unto the Court that by the act of Congress approved July 27, 1866, entitled "An act granting land to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," Congress incorporated the Atlantic and Pacific Railroad Company and granted to said company, to aid in the construction of said railroad, a large amount of lands in the State of California, and other states and territories, and to the whole of which said act your orators refer. (See United States Statutes, vol. 14, p. 292.)

Your orator further shows and alleges that said Atlantic and Pacific Railroad Company duly accepted said grant, and the terms and conditions of said act of July 27, 1866, within the time and manner therein required, and did designate upon plats or maps the whole of its line of route under said act, definitely locating the same from Springfield, Missouri, by way of the points and places named in said act, to the Pacific Ocean at San Buenaventura, in the State of California, and did file such plats or maps designating said line of route in the office of the Commissioner of the General Land Office within the time and in the manner provided in said act, definitely establishing the whole thereof.

That said company filed maps of definite location designating that part of its said line in the State of California in said office of the Commissioner of the General Land Office in the year 1872, and as said plats or maps were so filed in the Interior Department they were each then approved by the Secretary of the Interior, and upon the filing of such maps or plats as aforesaid the United States withdrew from market and reserved all the odd-numbered sections of land in California within thirty (30) miles of said line of route, including the lands hereinafter described, and in pursuance of orders of the Secretary of the Interior and Commissioner of the General Land Office, said withdrawal and reservation of said lands were made then of record in the general land office and United States district land offices in California by proper plats, diagrams and maps, to all of which your orator refers.

Your orator further shows that by section 18 of said act of July 27, 1866, Congress authorized the Southern Pacific Railroad Company, a company incorporated under the laws of California, to connect with said Atlantic and Pacific Railroad, and to aid in its construction, made to said Southern Pacific Railroad Company a grant of lands upon the same terms, conditions and limitations as the grant to the said Atlantic and Pacific Railroad Company.

Your orator further alleges that by the joint resolution of Congress approved June 28, 1870 (16 Stat. 382), the Southern Pacific Railroad Company was authorized to construct its said line of railroad as near as may be upon the line of route indicated by the map filed by said company in the Interior Department on January 3, 1867, and by said resolution there was granted to said company lands to the extent and amount granted to the said company by said act of Congress of July 27, 1866, subject to all the conditions and restrictions provided for in the third section of said act.

Your orator further alleges and shows unto the Court, that in pursuance of said joint resolution and of said act approved July 27, 1866, said Southern Pacific Railroad Company filed in the office of the Commissioner of the General Land Office in the Department of the Interior, on the 7th day of January, 1885, its map designating and definitely locating its line of route under said acts, from the Colorado river on the eastern boundary of California, thence westerly to Mojave, which said map was thereafter finally approved by the Secretary of the Interior, as the map of definite location of said line of railroad of said company.

Your orator further shows unto the Court and alleges that by the act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas

Pacific Railroad Company and to aid in the construction of its road, and for other purposes" (see U. S. Stats. vol. 16, pp 573-9), Congress incorporated and created the Texas Pacific Railroad Company and granted to said company to aid in the construction of said railroad a large amount of land in the State of California, and other states and territories, and to the whole of which said act your orator refers.

Your orator further shows to the Court that by section 23 of said act of Congress approved March 3, 1871, it was provided as follows: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to the said Southern Pacific Railroad Company of California by act of July 27, 1866, provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

Your orator further alleges that the Southern Pacific Railroad Company, in pursuance of the pro-

visions of said section 23 of said act of March 3, 1871, did during the years from 1874 to 1878, inclusive, file in the office of the Commissioner of the General Land Office in the department of the Interior, in sections, its map designating and definitely locating its lines of route from Mojave in the State of California, thence via Los Angeles to the Colorado River, at or near the town of Fort Yuma, and which said map so filed in sections was definitely approved by the Secretary of the Interior as the map of definite location of said railroad.

Your orator alleges that said Atlantic and Pacific Railroad Company did not, within the time or manner required by said act of Congress of July 27, 1866, nor at all, construct or complete any railroad or telegraph line, in whole or in part, within the State of California, and that by the act of Congress of July 6, 1886 (24 Stats. p. 123), all lands and rights to lands granted to and conferred upon said Atlantic and Pacific Railroad Company, within both granted and indemnity limits, and situated within the State of California, were forfeited and resumed to the United States, and said lands were by said act restored to the public domain.

Your orator further alleges that said lands within the thirty mile limits of and appertaining to the said Atlantic and Pacific Railroad Company were not granted to defendant Southern Pacific Railroad

Company by either or any of said acts of Congress, but, on the contrary, they were set apart and devoted by the United States to aid in the construction of said Atlantic and Pacific Railroad and were reserved from and excepted out of all grants made to said Southern Pacific Railroad Company, and neither said company nor any of the defendants herein have any right, title, or interest to said lands or any thereof, by virtue of any grant made to said Southern Pacific Railroad Company.

Your orator further alleges that the northeast quarter of the northeast quarter (NE. ¼ of NE. ¼) of section seven (7), township six (6) north, range eight (8) west, San Bernardino base and meridian, California, is situated within the granted and place limits of the said grant to the Atlantic and Pacific Railroad Company, made by said act of July 27, 1866, and opposite to the unconstructed portion thereof, and is also situated within the indemnity limits, but outside of the granted limits of the grant made to the Southern Pacific Railroad Company by the act of March 3, 1871 .

That the west half of section thirty-one (31), township nine (9) north, range fifteen (15) west, San Bernardino base and meridian, California, is situated within the indemnity limits of said grant made to the said Atlantic and Pacific Railroad Company by said act of July 27, 1866, opposite to the uncon-

structed portion thereof, and is also situated within the indemnity limits and outside the granted limits of the said grant made to the Southern Pacific Railroad Company by said act of March 3, 1871.

Your orator further alleges that regardless of your orator's rights, the Southern Pacific Railroad Company, on November 10th, 1902, filed applications in the Interior Department, per indemnity list No. 93, to select said lands as lands inuring to said company under its said grant of March 3, 1871, as indemnity lands, and on June 30th, 1903, the officers of the Interior Department of the United States, inadvertently and through error and mistake, caused a patent of the United States, in one form, to be issued to said Southern Pacific Railroad Company, for the said lands.

Your orator further alleges that within the indemnity limits of each of said grants of 1871 and 1866 to said Southern Pacific Railroad Company, there still remain more than 100,000 acres of public land in odd sections properly subject to selection, but unselected by said company.

Your orator further alleges that the Southern Pacific Railroad Company claims and pretends that it has sold said lands or some of them to numerous persons, purchasers in good faith, as a part of its said grant, and whose rights to said lands under said purchases are protected by the acts of Congress of

March 3, 1887 and March 2, 1896, but your orator is unable to state what, if any, of said lands have been so sold, or at what price, or the names of such purchasers, or the dates of sales, said railroad company having exclusive knowledge of said matters and things, but your orator alleges that all of the moneys which said railroad company has received in payment for such lands or of any thereof, on account of such sales, are held in trust by said railroad company for your orator, to the extent of one dollar and twenty-five cents per acre.

Your orator admits and alleges that said lands and all of them are of the value of one dollar and twenty-five cents per acre and over.

Your orator further alleges, that in former suits between the United States and the Southern Pacific Railroad Company, and the other defendants herein, commenced in the United States Circuit Court for the Southern District of California, and carried by appeal to the Supreme Court of the United States, it has been finally and conclusively adjudged and determined by said courts and all of them as follows:

1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.

2. That upon the acceptance of those maps by the Land Department, the rights of that company in

the lands so granted, attached, by relation, as of the date of the act of 1866; and

3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain. (See 168 U. S. 1, 66.)

And it was further, finally, and conclusively adjudged by said Court in said cause, that all of the lands and rights to lands granted to said Atlantic and Pacific Railroad Company by said act of Congress, were forfeited to the United States by said act approved July 6, 1886, for the use and benefit of the United States and not for the use or benefit of said Southern Pacific Railroad Company.

And it was further, finally and conclusively adjudged in said causes that said Southern Pacific Railroad Company could not and did not acquire under its said grant of March 3, 1871, either as granted lands or as indemnity lands, any lands or rights to lands falling within either the granted limits or indemnity limits of said grant to said

Atlantic and Pacific Railroad Company. (See 168 U. S. 1, 66.)

And it was further finally and conclusively adjudged in said causes that said Southern Pacific Railroad Company, in pursuance of said act of July 27, 1866, and said joint resolution of June 28, 1870, did file in the office of the Commissioner of the General Land Office in the Department of the Interior, on the 7th day of January, 1885, its map designated and definitely locating its line of route under said acts, from a point near Needles on the Colorado River westerly to Mojave in California, and that the Atlantic and Pacific Railroad Company in the year 1872 did file in the office of the Commissioner of the General Land Office in the Department of the Interior, its map designating and definitely locating its line of route under said act of July 27, 1866, from Springfield, Missouri, westerly to the Pacific Ocean at San Buenaventura, and that the United States was and is the owner by title absolute and in fee simple to an equal undivided moiety in all alternate sections of land designated by odd numbers within the place or granted limits of the grant of said Atlantic and Pacific Railroad in California, so far as those limits conflict with like limits of said grant of July 27, 1866 to said Southern Pacific Railroad Company, excepting those lands the title to which was in former litigations between the United

States and the Southern Pacific Railroad Company adjudged to belong to the United States. (See 183 U. S. 519, 536.)

Your orator further alleges that it was in said cause further, finally and conclusively adjudged, that the map filed by said Southern Pacific Railroad Company in the general land office in the year 1871, between Tehachapi Pass and the Colorado River at or near Fort Yuma, in pursuance of said act of March 3, 1871, was and is a map of general route only, and not a map of definite location. (See 146 U. S. 570, 619.)

Your orator further alleges and shows that said several suits between United States and the defendants herein, were numbered on the docket of the United States Circuit Court for the Southern District of California, as follows: Numbers 68, 88, 177, 178, 184 and 600, and that the decisions and opinions upon appeal, by the Supreme Court of the United States, are reported as follows: 146 United States Reports, pages 570 to 619, 168 United States Reports, pages 1 to 67, 183 United States Reports, pages 519 to 535, to which your orator refers.

Your orator further alleges that the lands and rights to lands granted to defendant Southern Pacific Railroad Company by section 18 of the act of Congress of July 27, 1866, and by joint resolution of June 28, 1870, and by section 23 of the act of

March 3, 1871, were all granted upon the same terms, conditions and restrictions as those granted to the Atlantic and Pacific Railroad Company by the said act of July 27, 1866, and that by section 20 of the said act of July 27, 1866, Congress expressly reserved the right and power to alter, amend or repeal that act.

Your orator further alleges that in pursuance of the right and power of Congress to alter, amend, or repeal the said acts granting lands to defendant Southern Pacific Railroad Company and the said Atlantic and Pacific Railroad Company that the act of Congress approved March 3, 1887 (24 Stat. 556) was passed, to which your orator refers.

Your orator further alleges that in further pursuance of said right and power to alter, amend and repeal said acts by Congress, the act approved March 2, 1896, (29 Stat. 42) was passed further providing that as to lands erroneously patented to any railroad company that,

"No patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Your orator further alleges that by section 2 of said act of March 2, 1896, it was provided as follows:

"Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Sec-

retary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee or the corporation, company, person, or association of persons, for whose benefit the certification was made for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided."

And to the whole of said acts your orator refers.

Your orator further alleges that the defendant Southern Pacific Railroad Company duly accepted the terms and conditions of the said acts of Congress of March 3, 1887 and March 2, 1896, such legislation being greatly in the interest of said company, and by

virtue of the provisions of the said acts has in numerous suits between the United States and said company, interposed by plea, answer and otherwise, defenses to suits brought to vacate patents for lands erroneously issued to said company by alleging that it had sold such lands to bona fide purchasers whose titles had been confirmed by said acts, and in numerous decrees entered in such suits has secured orders and decrees confirming the title of such purchasers or dismissing the bill as to such lands, and that said company by reason thereof, ought to be and is estopped from denying its acceptance of said acts.

Your orator further shows and alleges that in determining what of said lands have been sold by said railroad company to bona fide purchasers and as to what payments have been made and by whom and as to what has been received by said company, upon such sales and as to what still remains unpaid and as to what amount is owing to your orator by said railroad company, involves great complexity and that an accounting is necessary between your orator and said railroad company, and a discovery as hereinafter prayed is required.

Wherefore, your orator having no plain, speedy or adequate remedy at law, prays that the Court will quiet and determine the title of your orator to all of the said lands, and will adjudge that your orator is the owner of said lands by title in fee

simple, and that the defendants have no right, title, interest or estate therein or thereto, and that they be enjoined from claiming or asserting any right, interest, estate or title therein or thereto, especially any such claimed to exist under said act of Congress of March 3, 1871.

Your orator further prays that the Court will by a proper decree vacate and annul all patents issued by the United States to said Southern Pacific Railroad Company, for all of the said lands.

Your orator further prays that the Court will determine what of said lands have been sold by said Southern Pacific Railroad Company, and what thereof are held by bona fide purchasers, and what sums of money have been received by defendant Southern Pacific Railroad Company for said lands, if any, and in case it be found that any of said lands have been sold by said railroad company to bona fide purchasers, that the Court wil adjudge that said railroad company holds the moneys received for said lands in trust for your orator to the extent of $1.25 per acre, and that your orator have a lien for such sums upon all moneys or other property in the hands of said railroad company, received from the sale of such lands, and that said railroad company be required to account to your orator therefor.

Your orator prays for such other and further re-

lief as to the Court may seem equitable, and for costs of this suit.

May it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this honorable court, directed to the defendants Southern Pacific Railroad Company, D. O. Mills and Homer S. King, as trustees, and the Central Trust Company of New York as trustee, commanding them, and each of them, at a certain day, and under a certain penalty therein to be inserted, personally to be and appear before your Honors in this honorable court, and then and there to answer (but not under oath except as to the interrogatories hereto attached, answers under oath being hereby expressly waived except as to such interrogatories) all and singular the premises and to stand to, perform and abide such order and decree therein, as to your honors shall seem meet.

Your orator requires defendant Southern Pacific Railroad Company to show to the best of its knowledge, information and belief, and after an examination of its books and records, the following:

(1) Said company is required to state what sales or contracts to sell it has made of each of the tracts of land, with the name of the purchaser of each tract, and the name of each assignee or transferee of such tracts or of any contract given therefor by said company.

(2) The date of each such sale or contract to sell and the character of the instrument in writing, if any, given by said company to each such purchaser.

(3) The agreed purchase price of each such tract.

(4) The date and amount of each payment of principal and of interest upon each of such sales made by such several purchasers to said company.

And your orator will ever pray.

WM. H. MOODY,
Attorney General.
L. H. VALENTINE,
United States Attorney.
JOSEPH H. CALL,
Special Assistant U. S. Attorney.

Dated.

[Endorsed]: No. 1196. In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit. United States vs. Southern Pacific Railroad Co. et al. Bill of Complaint. Joseph H. Call, Special Assistant U. S. Attorney. Filed Jul. 17, 1905, at 10:45 A. M. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit.

No. ——.

THE UNITED STATES,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Amended Bill of Complaint Filed July 17, 1905.

The United States, in pursuance of the rules of this Honorable Court, files the following amendment to its bill of complaint in the above-entitled cause, by adding to said bill the following, to be inserted at the end of line 8, page 11, of said bill, and immediately preceding the prayer for relief, to wit:

"Your orator further alleges that more than ninety days prior to the filing of this bill of complaint the Secretary of the Interior, on behalf of the United States, made a demand upon defendant, Southern Pacific Railroad Company, for a relinquishment and reconveyance to the United States of the foregoing

described lands, so erroneously patented, which demand was then and there refused by said defendant."

Your orator seeks like process and relief as already sought in its bill of complaint, and waives answer under oath.

L. H. VALENTINE,
United States Attorney.
JOSEPH H. CALL,
Special Assistant U. S. Attorney.

[Endorsed]: Copy. No. 1196. In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit. United States vs. Southern Pacific Railroad Co. et al. Amendment to Bill of Complaint. Joseph H. Call, Special Assistant U. S. Attorney. Filed Jul. 17, 1905, at 10:50 A. M. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

To the Marshal of the United States for the Northern District of California.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

IN EQUITY.

The President of the United States of America, Greeting, to the Southern Pacific Railroad Company, a Corporation, D. O. Mills and Homer S. King, Trustees:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Los Angeles on the 4th day of September, A. D. 1905, to answer a bill of complaint and amendment to bill of complaint exhibited against you in said court by the United States and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this, 17th day of July in the year of our Lord one thousand

nine hundred and five and of our Independence the one hundred and thirtieth.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of September next, at the clerk's office of said Court pursuant to said bill and amendment to bill of complaint; otherwise the said bill and amendment will be taken pro confesso.

WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

Clerk's Office; Los Angeles, California.

United States Marshal's Office,
Northern District of California.

I hereby certify, that I received the within writ on the 21st day of July, 1905, and personally served the same on the 21st day of July 1905, on the Southern Pacific Railroad Company et al., by delivering to and leaving with N. T. Smith, treasurer of said Southern Pacific Railroad Company, said defendant named

therein, personally, at the county of San Francisco in said district, a copy thereof.

San Francisco, July 21, 1905.

JOHN H. SHINE,
U. S. Marshal.
By R. DeLancie,
Office Deputy.

[Endorsed]: Original No. 1196 U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. The United States vs. Southern Pacific Railroad Company, et al. Subpoena. Filed, Jul. 24, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

At a stated term, to wit the July Term, A. D. 1905, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the city of Los Angeles, on Monday, the seventeenth day of July, in the year of our Lord one thousand nine hundred and five—Present: The Honorable OLIN WELLBORN, District Judge.

THE UNITED STATES,

Complainants,

vs

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), D. O. MILLS and HOMER S. KING, as Trustees, and THE CENTRAL TRUST COMPANY OF NEW YORK (a Corporation), as Trustee,

Defendants.

Order Requiring Certain Defendants to Appear. etc.

At a stated term of the Circuit Court of the United States, for the Southern District of California, Southern Division, begun and holden at the city of Los Angeles, State of California, on the 10th day of July, A. D. 1905, the Honorable Olin Wellborn, United States District Judge for the Southern District of California, presiding, on the 17th day of July, A. D.

1905, in open court Joseph H. Call, Esq., Special Assistant United States Attorney, having moved the Court for an order to require certain defendants in the above-entitled suit to appear, plead and answer within a time to be specified, and hereinafter mentioned, and it appearing to the Court that said defendants in the above-entitled suit, to wit: D. O. Mills and Homer S. King, as trustees, and the Central Trust Company of New York, a corporation, trustee, are not inhabitants of and neither of them is an inhabitant of, nor can they or either of them be found within this judicial district, the Southern District of California, nor within the State of California, and that they have not and neither of them has voluntarily appeared in this suit.

And it further appearing to the Court that this suit is one to enforce a claim to certain real estate described in the bill of complaint and within this judicial district.

And it further appearing that there is no person or persons in possession or charge of said real estate,

Now, therefore, it is ordered and adjudged that said defendants D. O. Mills and Homer S. King, as trustees, and the Central Trust Company of New York, trustee, be, and they hereby are directed to appear in this court in the city of Los Angeles, State of California, on or before the first Monday of September, A. D. 1905, and to plead, answer or demur

to the bill of complaint in said suit on or before the first Monday in October, A. D. 1905.

And it is further ordered and adjudged that a copy of this order, duly certified by the clerk of this Court may be served upon each of the said defendants last named wherever they may be found.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original order made and entered by said Court on the 17th day of July, A. D. 1905, in the cause entitled The United States, Complainants, vs. The Southern Pacific Railroad Company (a Corporation), et al., Defendants, No. 1196, Southern Division, and remaining of record therein.

Attest my hand and the seal of said Circuit Court this 18th day of July, A. D. 1905.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy.

I hereby certify, that on the 25 day of July, 1905, at the city of New York, in my district, I served the within certified copy of order upon the within-named defendant Central Trust Company of New York by exhibiting to George Bertin, as secretary of said Co., at 54 Wall St. N. Y. City, the within certified copy,

and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 25 day of July, 1905, at the city of New York, in my district, I served the within certified copy of order upon the within-named defendant D. O. Mills by exhibiting to Ogden Mills, his son, who accepted service for him at #15 Broad St., N. Y. City, the within certified copy, and at the same time leaving with him a copy thereof. The within named D. O. Mills is in Europe.

WM. HENKLE,

United States Marshal, Southern District of New York.

Dated Jul. 25, 1905. (J. B. B.)

[Endorsed]: No. 1196. U. S. Circuit Court, Ninth Circuit, Southern District of California. Southern Division. The United States vs. The Southern Pacific Railroad Company (a Corporation), and others. Certified Copy Order Requiring Certain Defendants to Appear, etc. Filed, Jul. 29, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Alias Subpoena to Southern Pacific Railroad Company et al.

To the Marshal of the United States for the Northern District of California.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division

IN EQUITY.

The President of the United States of America, Greeting, to the Southern Pacific Railroad Company, a Corporation, D. O. Mills and Homer S. King, Trustees:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Los Angeles on the 4th day of September, A. D. 1905, to answer a bill of complaint and amendment to bill of complaint exhibited against you in said court by the United States and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of July in the year of our Lord one thousand

nine hundred and five and of our Independence the one hundred and thirtieth.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of September next, at the clerk's office of said Court pursuant to said bill and amendment to bill of Complaint; otherwise the said bill and amendment will be taken pro confesso.

WM. M. VAN DYKE,
Clerk,
By Chas. N. Williams,
Deputy Clerk.

Clerk's Office, Los Angeles, California.

United States Marshal's Office,
Northern District of California.

I, hereby certify, that I received the within writ on the 2d day of August, 1905, and personally served the same on the 2d day of August, 1905, on Homer S. King., as trustee, by delivering to and leaving with Homer S. King, said trustee, and one of said defendants named therein, personally, at the city and

county of San Francisco, in said district, a copy thereof.

JOHN H. SHINE,
U. S. Marshal.
By E. A. Morse,
Office Deputy.

San Francisco, August 2d, 1905.

[Endorsed]: Original. No. 1196. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. The United States vs. Southern Pacific Railroad Co., et al. Alias Subpoena. Filed, Aug. 4, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit.

No. 1196.

THE UNITED STATES,
Plaintiff,

vs

THE SOUTHERN PACIFIC RAILROAD COMPANY, and Others,
Defendants.

Amendment to Bill of Complaint Filed August 30, 1905.

The United States hereby amends its bill of complaint in this cause, by adding to said bill, on page 10, at the end of line 16, after the words "orator refers" and before the words "your orator," the following allegation:

Your orator further alleges, upon information and belief, that the defendants D. O. Mills and Homer S. King, as trustees, and Central Trust Company, of New York, as trustee, claim to have and to hold a lien upon the lands hereinbefore described, as trustees, in virtue of a mortgage or mortgages executed by the Southern Pacific Railroad Company to secure certain negotiable bonds, which said defendants claim are outstanding and held by bona fide purchasers, but your orator has no knowledge or information as to the amount of bonds so claimed to be secured, nor the date of issuance of the same, and your orator alleges that all such claims to a lien and mortgage upon said lands are unfounded, and that in fact said defendants have no valid lien or mortgage upon, or claim to, said lands, or any part thereof.

_____,
United States Attorney.
JOSEPH H. CALL,
Special Assistant U. S. Attorney.

[Endorsed]: No. 1196. In the Circuit Court of the United States, Southern District of California, Ninth Circuit. The United States, Plaintiff, vs. The Southern Pacific Railroad Company, and Others, Defendants. Amendment to Bill of Complaint. Filed, Aug. 30, 1905. Wm. M. Van Dyke, Clerk. Joseph H. Call, Special Assistant U. S. Attorney.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

Case No. 1196.

UNITED STATES,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Answer of Southern Pacific Railroad Company et al.

The joint and several answer of the defendants Southern Pacific Railroad Company, Homer S. King, trustee, and Central Trust Company of New York, trustee, to plaintiff's bill of complaint as amended, in the above-mentioned case.

The above-named defendants, now and at all times saving unto themselves and each of them all and all manner of benefit or advantage of exception or other-

wise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto or to so much thereof as they are advised it is material or necessary to make answer to, jointly and severally answering the said bill of complaint admit, deny and allege as follows:

1st. Admit that by the Act of Congress referred to in the bill of complaint, approved July 27th 1866, Congress incorporated the Atlantic & Pacific Railroad Company, and made a grant unto that company of a large amount of lands in the State of California.

2d. Allege that they have no information or knowledge about such matters, and on that ground deny that the Atlantic & Pacific Railroad Company duly accepted the said grant, or duly accepted the terms or conditions of the said Act of July 27th, 1866, within the time and manner required, or at all; and on the same ground deny that the Atlantic & Pacific Railroad Company did designate on plats or maps the whole of its, or the whole of any, line of route under said act definitely locating the same from Springfield, Missouri, by way of the points and places named in the said act to the Pacific Ocean at San Buenaventura or elsewhere; and on the same ground deny that the Atlantic & Pacific Railroad Company did file such, or any, plats or maps designating said,

or any, line of route (except as hereinafter expressly admitted) in the office of the Commissioner of the General Land Office, within the time or in the manner provided in said act, definitely or otherwise establishing the whole or any part thereof.

3d. Admit that in the year 1872, the Atlantic & Pacific Railroad Company filed in the general land office several maps which together designated a line of railroad route in the State of California; admit that those maps were, during the year 1872, approved by the Secretary of Interior as maps of definite location; admit that thereafter (but not thereupon, as it said in the bill of complaint) the proper officers of the United States withdrew from market all odd sections of public land in the State of California lying within twenty miles of the said line of route, and including the lands described in the bill of complaint.

4th. Admit that by section 18 of the said act of July 27th, 1866, Congress authorized the Southern Pacific Railroad Company, a company incorporated under the laws of the State of California, to connect with the Atlantic & Pacific railroad at such point near the boundary line of the State of California as the Southern Pacific Railroad Company deemed most suitable for a railroad to San Francisco; and admit that, to aid in construction of the railroad which it was so authorized to construct,

the said section 18 made unto the said Southern Pacific Railroad Company a grant of lands similar to, and subject to the same conditions and limitations as, the grant made by the same Act to the Atlantic & Pacific Railroad Company.

5th. Deny that it is wholly true, in manner and form as set forth in the bill of complaint, that by the joint resolution of Congress approved June 28th, 1870, the said Southern Pacific Railroad Company was authorized to construct its said line of railroad as near as may be upon the line of route indicated by the map filed by the said company in the Interior Department on January 3d, 1867, and by the said joint resolution there was granted to the said company lands to the extent and amount granted to it by the said Act of July 27th 1866; and allege that the true facts and particulars as to such matters and things are as follows: On January 3d, 1867, the said Southern Pacific Railroad Company filed in the Interior Department a map designating a line of route for the railroad it was authorized by the said act of July 27th, 1866 to construct. A portion of the line shown on that map between Needles and Mojave was along the same general course of, and contiguous to, a line of route thereafter designated by the Atlantic & Pacific Railroad Company. In that way a question arose in the Department of Interior as to whether the Southern Pacific Rail-

road Company was authorized by the act of July 27th, 1866, to construct a railroad long the said portion of line of route designated on the map of January 3d, 1867; and so it was that Congress, by the joint resolution of June 28th, 1870, accepted and approved the line designated by the said map of January 3d, 1867 as the line contemplated for the said Southern Pacific Railroad Company by the act of July 27th, 1866, and declared that the said Southern Pacific Railroad Company might construct its railroad as near as may be along that line, and in aid thereof receive the land grant provided by the said act of July 27th, 1866.

6th. Admit that said Southern Pacific Railroad Company filed in the Department of Interior maps designating and definitely locating its line of railroad from Needles to Mojave; and admit that said maps were finally approved by the Secretary of Interior as such maps. But defendants allege that said maps were so filed in five several sections, the earliest thereof on January 31st 1878, the latest thereof on December 31st, 1884, and that the said three other maps were so filed on dates intermediate January 31st, 1878 and December 31st, 1884; allege that each and all of said maps were finally approved and accepted by the Secretary of Interior on and before January 7th, 1885; and defendants say it is not true, as alleged in the bill of complaint, that all of said maps were filed in the office of the Commis-

sioner of the General Land Office on January 7th, 1885, nor is it true as alleged in the bill of complaint that the Secretary of Interior did not finally approve those maps until after January 7th, 1885.

7th. Admit and allege that section 23 of the act of Congress approved on March 3d, 1871, referred to and quoted from on pages three and four of the bill of complaint, provided as follows: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six; provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

8th. Admit that the said Southern Pacific Railroad Company filed in the Department of Interior, and the Secretary of Interior finally approved, maps in five several sections definitely locating the entire

railroad it was authorized by section 23 of the said act of March 3d, 1871 to construct; and allege that the earliest of said maps was so finally approved on May 11th, 1874, that the latest thereof was finally approved on January 31st, 1878, and that the said three other maps were so finally approved on dates intermediate May 11th, 1874 and January 31st, 1878.

9th. Admit that the Atlantic & Pacific Railroad Company did not construct any railroad in the State of California; and admit that by act of Congress approved July 6th, 1886, referred to in the bill of complaint, all lands in California granted to the Atlantic & Pacific Railroad Company, within both granted and indemnity limits thereof, were forfeited and resumed to the United States, and restored to the public domain.

10th. Deny that said lands within the thirty mile limits of and appertaining to the said Atlantic & Pacific Railroad Company were not granted to the Southern Pacific Railroad Company by either or any of said acts of Congress; deny that they were set apart and devoted by the United States to aid in the construction of said Atlantic & Pacific Railroad; deny that they were reserved from or excepted out of all grants made to the Southern Pacific Railroad Company; and deny that neither said company nor any of the defendants herein have any right,

title or interest to said lands or any thereof by virtue of any grant made to the said Southern Pacific Railroad Company. In this behalf defendants allege that a large portion of the odd-numbered sections of land lying within twenty miles and thirty miles of the line designated on the maps accepted and approved as definitely locating the railroad which the said act of July 27th, 1866, authorized the Atlantic & Pacific Railroad Company to construct in California, were granted to the Atlantic & Pacific Railroad Company and Southern Pacific Railroad Company in equal undivided moieties, and other large portions thereof were granted solely to the said Southern Pacific Railroad Company, and other portions thereof have been duly and properly selected by the said Southen Pacific Railroad Company, under direction of the Secretary of Interior, as indemnity lands, by and in virtue of the said acts of Congress.

11th. Admit that the northeast quarter of northeast quarter (NE. ¼ of NE. ¼) of section seven (7) in township six (6) north, range eight (8) west, San Bernardino base and meridian, is within twenty miles on one side of the line designated on the said maps which were accepted and approved as definitely locating the railroad which the said act of Congress of July 27th, 1866, authorized the Atlantic & Pacific Railroad Company to construct in California, and opposite the unconstructed portion thereof; and

admit that the said land is also within the indemnity limits and outside the primary limits of the land grant made unto the Southern Pacific Railroad Company by the said act of Congress of March 3d, 1871.

12th. Admit that the west half (W. ½) of section thirty-one (31), in township nine (9) north, range fifteen (15) west, San Bernardino base and meridian, is situated within thirty miles on one side of but more than twenty miles from the line designated on the said maps which were accepted and approved as definitely locating the railroad which the said act of Congress of July 27th, 1866, authorized the Atlantic & Pacific Railroad Company to construct in California, and opposite the unconstructed portion thereof; and admit that the said land is also within the indemnity limits and outside the primary limits of the land grant made unto the Southern Pacific Railroad Company by the said act of Congress of March 3d, 1871.

13th. Admit and allege that on November 10th, 1902, the Southern Pacific Railroad Company filed applications in the Interior Department, per indemnity list No. 93 and under direction of the Secretary of Interior, to select the lands described in the "11th" and "12th" paragraphs of this answer as indemnity lands, under and in pursuance of the indemnity provisions of the said act of Congress of

March 3d, 1871; admit and allege that on June 30th, 1903, the proper officers of the United States issued a patent, in due form, unto said Southern Pacific Railroad Company, conveying title in fee simple to and for the said lands; but deny that the said patent was issued inadvertently, through error, or mistake; and allege that the said patent was duly, intentionally, and lawfully issued, wholly without error or mistake, for lands for which the said company was duly and lawfully entitled to receive such patent under and in pursuance of its said indemnity selection thereof.

14th. Admit that within the indemnity limits of each of said grants of 1866 and 1871 to the said Southern Pacific Railroad Company, there still remain more than one hundred thousand acres of public lands in odd sections properly subject to selection but unselected by said company. In this behalf defendants allege, on information which they believe to be true, that all lands realized or to be realized within primary limits, together with all lands patented, selected, subject of selection or to become subject of selection, within indemnity limits of the grant made unto the said Southern Pacific Railroad Company by the said act of March 3d, 1871, do not equal or make the quantity of land granted to the said company by the said act of March 3d, 1871; and further allege that the said Southern

Pacific Railroad Company has not received, the lands in this suit included, the quantity of land granted to it by the said act of March 3d, 1871.

15th. Admit and allege, that the defendants D. O. Mills and Homer S. King, as trustees, and Central Trust Company of New York, as trustee, each claims to have and to hold a lien upon the lands hereinbefore described, as trustees, under and by virtue of the mortgages hereinafter set forth.

16th. Allege that on or about April 1st, 1875, by instrument in writing, bearing that date, the said Southern Pacific Railroad Company duly made, executed and delivered unto the defendant D. O. Mills and one Lloyd Tevis, as trustees, a mortgage covering all lands described in the bill of complaint herein, with other lands, to secure payment of negotiable bonds issued and to be issued as in the said mortgage provided; under the provisions of which mortgage negotiable bonds were duly issued and sold to purchasers in good faith for full value in money paid, without notice or knowledge of the said Atlantic & Pacific grant, or that the United States had or made any claim to the lands described in the bill of complaint herein; of which lands, so issued and sold, there are, and at the time this suit was brought were, outstanding and unpaid, bonds exceeding sixteen million dollars in value. The said Homer S. King, trustee, named as one of the de-

fendants in and to this suit, has been duly substituted as such trustee under the said mortgage, in place and stead of the said Lloyd Tevis, trustee.

17th. Allege that on or about September 15th, 1893, by instrument in writing bearing that date, the said Southern Pacific Railroad Company duly made, executed and delivered unto the defendant Central Trust Company of New York, a corporation, as trustee, a second mortgage or deed of trust covering all lands described in the bill of complaint herein, with other lands, to secure payment of negotiable bonds issued and to be issued as in the said mortgage or deed of trust provided; under the provisions of which mortgage or deed of trust negotiable bonds were duly issued and sold to purchasers in good faith, for full value in money paid, without notice or knowledge of the said Atlantic & Pacific grant or that the United States had or made any claim to the lands described in the bill of complaint herein; of which bonds, so issued and sold, there are, and at the time this suit was brought were, outstanding and unpaid, bonds exceeding twenty-seven million dollars in value.

18th. Admit and allege that on July 23d, 1885, the said Southern Pacific Railroad Company sold, under contract for deed No. 4722 but for the full sum of three hundred and eight (308.00) dollars, cash in hand that day paid, the west half (W. ½) of section thirty-one (31), in township nine (9) north,

range fifteen (15) west, San Bernardino meridian, containing three hundred and eight (308.00) acres, unto the Atlantic & Pacific Fibre Importing and Manufacturing Company, a corporation; and by instrument in writing bearing date January 27th, 1893, the said Atlantic & Pacific Fibre Importing and Manufacturing Company duly assigned the said contract, and its interest in the lands therein described, unto Jackson Alpheus Graves; but deny that the, or any, moneys received from such sale, are or at any time were, held by said company or any of these defendants, in trust for the United States, or subject to a lien in favor of the United States, to any extent whatever.

19th. Admit and allege that the mortgages, sale and assignment set forth in the "16th," "17th" and "18th" subdivisions of this answer, was and were each made to a corporation or person who purchased in good faith, for full value of the lands, without notice that the lands purchased were at any time within limits of the Atlantic & Pacific grant other than such presumptive notice thereof as the law gave unto all persons; but deny that the said Southern Pacific Railroad Company claims or pretends that it has sold said lands, or some of them, to numerous persons or otherwise than as hereinbefore set forth, purchasers in good faith, as a part of its said grant, and whose rights to said lands are protected by the acts of Congress of March 3d,

1887, or March 2d, 1896; and further deny that the land so sold is or at any time was, worth one dollar and twenty-five cents per acre, or any sum in excess of one dollar per acre.

20th. Admit and allege that in the former suits referred to in the bill of complaint, brought by the United States against the Southern Pacific Railroad Company and others, it was finally and conclusively adjudged by the Supreme Court of the United States as is reported in volume 146 of United States Reports, on pages 570 to 619, volume 168 of United States Reports, on pages 1 to 67, and volume 183 of United States Reports, on pages 519 to 535; but deny that it has been finally, conclusively or otherwise, determined in said suits or in any suits, as is alleged and set forth in the bill of complaint. Defendants refer to the said United States Reports in support of the denials of this paragraph, and to truly show unto this Court what the Supreme Court of the United States did decide in those cases.

21st. Admit that Congress expressly reserved the right and power to alter, amend or repeal the said act of July 27th, 1866, by the following provision in section 20 thereof: "And be it further enacted, That the better to accomplish the object of this act; namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working or-

der, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act." But defendants allege that the said Southern Pacific Railroad Company constructed and fully equipped the railroad contemplated by the said act of July 27th, 1866, and the same was finally accepted by the United States prior to the year 1885; and that the said company constructed and fully equipped the railroad contemplated by the said act of March 3d, 1871, and the same was finally accepted by the United States prior to the year 1879; and these defendants are advised and believe, and so allege, that all power of Congress to alter, amend or repeal the said act of July 27th, 1866 or the said act of March 3d, 1871 or any provision of either thereof relating to the land grants or indemnity provisions therein made or provided for the said Southern Pacific Railroad Company, ceased and determined upon final acceptance of the said railroads, respectively, as aforesaid, if not theretofore.

22d. Deny that the act of Congress approved March 3d, 1887, or the act of Congress approved on March 2d, 1896, referred to in the bill of complaint, was or were passed in pursuance of the, or any, right

or power of Congress to alter, amend or repeal the said act of July 27th, 1866 or the said act of March 3d, 1871, or any provision or either of said acts relating to the land grants or indemnity provisions therein made and provided for the said Southern Pacific Railroad Company; and these defendants are advised and believe that neither the said act of March 3d, 1887, or the said act of March 2d, 1896, was or were intended to, did, or could, alter, amend, or repeal the said act of July 27th, 1866, of the said act of March 3d, 1871, or any provision of either thereof relating to the land grants or indemnity provisions therein made and provided for the said Southern Pacific Railroad Company.

23d. Admit and allege that the act of Congress approved on March 2d, 1896, referred to in the bill of complaint, provides as is published in the United States Statutes at Large, volume 29, pages 42 and following, to which defendants refer; but deny that the said act provides as is set forth in the bill of complaint, in the manner and form therein stated.

24th. Deny that the said Southern Pacific Railroad Company, these defendants or any of them, duly or otherwise accepted the terms or conditions of the said act of March 3d, 1887, or the terms or conditions of the said act of March 2d, 1896; deny such legislation is greatly, or at all, in the interest of said company, and in this behalf allege that in

so far as those acts seek to confirm the title of certain purchasers of land at cost and expense of railroad companies, and seek to fix a price to be paid by such companies unto the United States the provisions of those acts, and each of them, are largely against the interests and lawful rights of said company and these defendants; admit that in numerous suits between the United States and the said Southern Pacific Railroad Company, the said company has by plea, answer and otherwise, alleged and shown sales of land to persons whose title is declared confirmed by the said act of March 2d, 1896; admit that in pursuance of proofs of such sales, decrees have been entered adjudging confirmation of land titles by the said act of March 2d, 1896, held by puchasers from said company; but deny that the said company, or these defendants, is or are thereby, or for any cause, estopped from denying acceptance of the said acts, or either of them. In this behalf defendants allege that they are informed and believe that the provisions of said acts declaring a class of persons therein specified to be bona fide purchasers, and the provisions of the said act of March 2d, 1896, declaring certain titles confirmed, are each and all gratuitous and absolute provisions made by Congress, wholly independent of other provisions of said acts purporting to impose specified costs and charges against railroad companies, and purporting to create

and provide right of suit or action to recover such costs and charges; and defendants are advised and believe, and so allege, that the said acts, in so far as they seek or purport to impose costs or charges against railroad companies, or to provide right of suit or action to recover such costs or charges, are unjust, unlawful, and not properly enforcible.

25th. Deny that in determining what lands described in the bill of complaint have been sold to bona fide purchasers, or in determining what payments have been made or by whom made or what has been received by or remains unpaid to said company upon such sales, or what amount (if any) is owing to the United States, great or any complexity is involved; and allege that such determinations, each and all, present a simple question in elementary arithmetic, without complexity, counterclaim or offset. In this behalf defendants allege that they are advised and believe that if the United States has any claim or demand whatsoever against them or either of them for the recovery of money, arising or to arise out of any matter or thing set forth in the bill of complaint, the United States has a plain, speedy and adequate remedy at law, in assumpsit, for recovery of the same.

26th. And these defendants deny all and all manner of matter, cause or thing in plaintiff's bill of complaint contained, material or necessary for them

to make answer to and not herein well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of any of them (these defendants). All of which matters and things these defendants are ready and willing to aver, maintain, and prove, as this Honorable Court may direct; and these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WM. SINGER, Jr.,
Attorney for the Defendants.

WM. F. HERRIN and
ALBERT F. RATHBONE,
Counsel for the Defendants.

State of California,
City and County of San Francisco,—ss.

J. L. Willcutt makes solemn oath and says: I am secretary of the Southern Pacific Railroad Company, one of the defendants in the foregoing suit or action. In so far as the foregoing answer relates or refers to acts or things done or performed by me as such secretary, the same is true of my own knowledge; and as to all other matters and things therein set forth, I believe the same to be true.

J. L. WILLCUTT.

Subscribed and sworn to before me on September 26th, 1905.

[Seal] E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire Feb'y. 20th, 1906.

State of California,

City and County of San Francisco,—ss.

Fred W. Haswell, being duly sworn, deposes and says: I am chief clerk in the office of Wm. Singer, Jr., room 1127, Merchants' Exchange Building, city of San Francisco, State of California, and over twenty-one years of age. On this September 28th, 1905, I deposited in the United States mail, in the city of San Francisco, State of California, an envelope addressed to "Hon. Joseph H. Call, Tajo Building, Los Angeles, Cal'a," postage prepaid, containing a full, true and correct copy of the attached "Answer of Defendant Southern Pacific Railroad Company et al.," in case No. 1196, U. S. Circuit Court, Southern District of California, Southern Division.

F. W. HASWELL,

Subscribed and sworn to before me on September 28th, 1905.

[Seal] E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire Feb'y 20th, 1906.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States, vs. Southern Pacific Railroad Co., et al. Answer of Defendant Southern Pacific Railroad Company, et al. Filed Sep. 29, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., Room 1127, Merchants' Exchange, San Francisco, Cal., Atty. for Defendants.

In the United States Circuit Court, Southern District of California, Southern Division, Ninth Circuit.

No. 1196.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and Others,

Defendants.

Replication.

Replication of the United States to the answer of Southern Pacific Railroad Co., Homer S. King, trustee, and Central Trust Co., trustee, defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said

bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this Honorable Court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

JOSEPH H. CALL,

Special Asst. U. S. Atty., and of Counsel for Complainant.

[Endorsed]: No. 1196. In the U. S. Circuit Court, Southern Dist. of Cal. United States of America, Complainant, vs. Southern Pacific Railroad Co., et al., Defendants. Due Service Hereof by Copy this made by Mail. J. H. Call, Solicitor forPlff. Replication of U. S. to Ans. of S. P. R. R. Co. et al. Filed Sep. 29, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Joseph H. Call, Special Asst. U. S. Atty.

In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit.

No. ——.

THE UNITED STATES,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Stipulation Relative to Filing Amendment to Bill of Complaint, etc.

It is hereby stipulated that the complainant in the above-entitled cause may file an amendment to the bill of complaint herein, bringing in Jackson Alpheus Graves as a party defendant.

It is further stipulated that the answer of the Southern Pacific Railroad Company and others, on file in this cause, shall stand as the answer of Jackson Alpheus Graves, with the same effect as if his name had been specifically mentioned in said answer as a party answering the bill.

It is further stipulated that the replication of the United States to the answer shall stand to the answer of Jackson Alpheus Graves.

Dated this second day of November, 1905.

JOSEPH H. CALL,
Special Assistant U. S. Attorney.
WM. SINGER, Jr.,
Attorney for Defendants.

[Endorsed]: No. 1196. In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit. United States vs. Southern Pacific Railway, et al. Stipulation. Filed Nov. 23, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Joseph H. Call, Special Assistant U. S. Attorney.

In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit.

No. ——.

THE UNITED STATES,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Amendment to Blll of Complaint Filed November 23, 1905.

The United States, by the Attorney General thereof, by leave of Court first obtained, amends its bill of complaint in this cause, by inserting after the end of line 20, on page 1, the following words:

"And Jackson Alpheus Graves, a citizen and resident of the county of Los Angeles, in the Southern Judicial District of the State of California."

Also amends said bill of complaint by inserting, after the end of line 30, on page 6, thereof, the following:

"Your orator alleges, upon information and belief that the defendant Jackson Alpheus Graves claims and pretends to have and to hold some title or interest

or estate in and to the lands above described in this bill of complaint, but your orator alleges that the said claim and pretense are unfounded, and that the said Jackson Alpheus Graves has no legal or equitable right, title or estate in and to said lands, or in any thereof."

Your orator prays for the issuance of the process of subpoena, and for relief against said Jackson Alpheus Graves, as it hath already prayed as against the other defendants in this cause.

Your orator waives answer under oath.

L. H. VALENTINE,
United States Attorney.
JOSEPH H. CALL,
Special Assistant U. S. Attorney.

[Endorsed]: No. 1196. In the Circuit Court of the United States, Southern Division, Southern District of California, Ninth Circuit. United States, vs. Southern Pacific Railroad Co., et al. Amendment to Bill of Complaint. Service by Copy Admitted on November 21st, 1905. Wm. Singer, Jr., Attorney for Defendants. Filed Nov. 23, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Joseph H. Call, Special Assistant U. S. Attorney.

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1196.

THE UNITED STATES,

Complainant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), D. O. MILLS and HOMER S. KING, Trustees, THE CENTRAL TRUST COMPANY OF NEW YORK, Trustee, and JACKSON ALPHEUS GRAVES,

Defendants.

Enrollment.

The complainants filed their bill of complaint herein against the defendants, the Southern Pacific Railroad Company, a corporation, D. O. Mills, and Homer S. King, Trustees and The Central Trust Company of New York, Trustee, on the 17th day of July, 1905, which is hereto annexed.

The complainants filed an amendment to their bill of complaint herein on the 17th day of July, 1905, which is hereto annexed.

A writ of subpoena directed to the United States Marshal for the Northern District of California, re-

quiring the defendants, the Southern Pacific Railroad Company, a corporation, D. O. Mills, and Homer S. King, trustees, to appear and answer to said bill of complaint, and amendment to bill of complaint, was thereupon, on said 17th day of July, 1905, issued, returnable on the 4th day of September, 1905, which is hereto annexed.

On the 17th day of July, 1905, the Court made and entered an order herein that the defendants, D. O. Mills and Homer S. King, as trustees, and the Central Trust Company of New York, a corporation, trustee, appear herein on or before the first Monday in September, 1905, and plead, answer or demur to the bill of complaint on or before the first Monday in October, 1905, a copy of which order is hereto annexed.

An alias writ of subpoena directed to the United States Marshal for the Northern District of California, requiring the defendants, the Southern Pacific Railroad Company, a Corporation, D. O. Mills, and Homer S. King, trustees, to appear and answer to said bill of complaint and amendment to bill of complaint, was thereafter on the 24th day of July, 1905, issued, returnable on the 4th day of September, 1905, which subpoena is hereto annexed.

The complainants filed an amendment to their bill of complaint herein on the 30th day of August, 1905, which is hereto annexed.

The defendants, Southern Pacific Railroad Company, and Homer S. King, trustee, appeared herein on the 5th day of September, 1905, by Wm. F. Herrin, Esq., and Wm. Singer, Jr., Esq., their solicitors.

The defendant Central Trust Company of New York, trustee, appeared herein on the 5th day of September, 1905, by Albert Rathbone, Esq., and Wm. Singer, Jr., Esq., their solicitors.

On the 29th day of September, 1905, the joint and several answer of the defendants, Southern Pacific Railroad Company, Homer S. King, trustee, and Central Trust Company of New York, trustee, to complainants' bill of complaint as amended was filed herein, and is hereto annexed.

The replication of complainants to the answer of defendants, Southern Pacific Railroad Co., Homer S. King, trustee, and Central Trust Co., trustee, was filed herein on the 29th day of September, 1905, and is hereto annexed.

On the 23d day of November, 1905, a stipulation signed by counsel for the respective parties stipulating "that the complainant in the above-entitled cause may file an amendment to the bill of complaint herein, bringing in Jackson Alpheus Graves as a party defendant," and further stipulating "that the answer of the Southern Pacific Railroad Company, and other, on file in this cause, shall stand as the answer of Jackson Alpheus Graves, with the same effect as

if his name had been specifically mentioned in said answer as a party answering the bill," and further stipulating "that the replication of the United States to the answer shall stand to the answer of Jackson Alpheus Graves," was filed herein and is hereto annexed.

The complainants filed an amendment to their bill of complaint herein on the 23d day of November, 1905, bringing in Jackson Alpheus Graves as a party defendant, which is hereto annexed.

Testimony was thereafter taken on behalf of the respective parties, and filed in the clerk's office of said Circuit Court.

On the 21st day of May, 1906, being a day in the January Term, A. D. 1906, of said Circuit Court, said cause came on to be heard before the Court on the pleadings and proofs, and having thereupon been submitted to the Court, before the Honorable Erskine M. Ross, Circuit Judge, for its consideration and decision upon the pleadings and proofs, and upon briefs which were thereafter filed, and the Court having duly considered the same, and being fully advised in the premises, thereafter on the 21st day of January, 1907, being a day in the January Term, A. D. 1907, of said Circuit Court, ordered that a decree be entered herein for the complainants, and, accordingly, on the 18th day of March, 1907, a final decree was signed,

filed, entered and recorded herein, and is hereto annexed.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

Case No. 1196.

UNITED STATES,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al,

Defendants.

Final Decree.

This cause came on for final decree, in open court, this -18th day of March, 1907.

The complainant, the United States, appeared by Mr. Joseph H. Call, Special Assistant United States Attorney; and the defendants, Southern Pacific Railroad Company, Homer S. King, as trustee, Central Trust Company of New York, as trustee, and Jackson Alpheus Graves, appeared by Mr. Wm. F. Herrin and Mr. Albert Rathbone, their counsel, and by Mr. Wm. Singer, Jr., their attorney.

Issue having been joined, the testimony having been taken, and the cause having been argued and submitted, the Court, being fully advised in the premises, orders, adjudges and decrees as follows:

It is ordered, adjudged, and decreed, that the complainant, the United States, is owner, by title absolute and in fee, of the Northeast quarter of northeast quarter (NE.¼ of NE.½) of section seven (7), in township six (6) north, range eight (8) west, and the west half of section thirty-one (31), in township nine (9) north, range fifteen (15) west, San Bernardino base and meridian; that the said defendants have not, nor has either of them, any right, title estate or interest in, or lien upon, the said lands, or any part thereof; and that the said defendants, and all persons claiming or to claim by, through or under them, are and each of them is, forever enjoined from asserting or claiming any right, title estate or interest in, or lien upon, the said lands or any part thereof, adverse to the complainant.

It is further ordered, adjudged and decreed, that all patents issued by the United States unto the defendant Southern Pacific Railroad Company for the said lands or any part thereof, are hereby canceled and annulled as to said lands.

It is further ordered, adjudged and decreed, that complainant, the United States, have and recover from the defendant Southern Pacific Railroad Com-

pany, its costs herein taxed at $208.60/100; and that execution may issue for the recovery thereof.

ROSS,
Circuit Judge.

Decree entered and recorded March 18, 1907.

WM. M. VAN DYKE,
Deputy Clerk.
By Chas. N. Williams,
Clerk.

[Endorsed]: Case No. 1196. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States vs. Southern Pacific Railroad Co. et al, Decree. Filed Mar. 18, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Whereupon the said bill of complaint, amendment to bill of complaint, writ of subpoena, copy of order that the defendants appear, alias writ of subpoena, amendment to bill of complaint, joint and several answer, replication of complainants to the answer of defendants, stipulation that amendment to bill bringing in a new party defendant may be filed, amendment to bill of complaint, and final decree, are hereto annexed, said final decree being duly

signed, filed and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 1196. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Southern Division. The United States vs. The Southern Pacific Railroad Company, et al. Enrolled Papers. Filed March 18th, 1907. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded, Decree Register Book No. 3, page 223.

In the Circuit Court of the United States, for the Southern District of California, Southern Division.

No. 1196.

THE UNITED STATES,
Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,
Defendants.

Opinion.

The agreed statement of facts shows that one of the two tracts of land involved in this suit is situated within the primary, and the other within the indemnity limits of the grant made by Congress to the Atlantic & Pacific Railroad Company by the act of July 27, 1866 (14 Stats. 292). Neither of the tracts is within the grant made by the same act to the Southern Pacific Railroad Company, but the latter company claimed them under the grant made to it by the act of Congress of March 3, 1871 (16 Stats. 573), under which it undertook to select them as indemnity land given it by that Act, and which selections were allowed by the Land Department, followed by patents of the Government.

Both of those acts of Congress, and the rights of the respective railroad companies thereunder have heretofore been the subject of frequent consideration and adjudication by this Court, as well as by the Supreme Court, so that it does not now seem necessary to do more than to cite the cases which, in my opinion, require a decree in this case in favor of the complainant.

Accordingly, on the authority of Southern Pacific Railroad Company v. United States, 189 U. S. 447, United States v. Southern Pacific Railroad Company, 146 U. S. 570, Southern Pacific Railroad Com-

pany v. United States, 183 U. S. 519, Southern Pacific Railroad Company v. United States, 168 U. S. 1, idem 184, U. S. 49, United States v. Southern Pacific Railroad Company, 117 Fed. 544, idem 200, U. S. 341, judgment will be entered for the complainant.

ROSS,
Circuit Judge.

[Endorsed]: No. 1196. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. The United States vs. Southern Pacific Railroad Co. et al. Opinion. Filed Jan. 21, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

Case No. 1196.

UNITED STATES,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and Others,

Defendants.

Stipulation as to Evidence.

It is stipulated and agreed by and between the parties to this case, subject to all valid objections as to materiality and relevancy, as follows:

Subdivision I.

Item 1. That all acts of Congress and laws of the State of California, whether of public or private, general or special, nature, and all official acts and decisions of the Commissioner of the General Land Office and Secretary of Interior relating to the Southern Pacific Railroad Company or to the Atlantic and Pacific Railroad Company or affecting the rights of either of said companies or of the United States, and all decisions of the Supreme Court of the United States reported in the United States Reports relating to or affecting the rights of either of said companies, in so far as relevant and material to the issues and controversies in this case, shall be deemed before this Court for judicial notice.

Subdivision II.

Item 2. The act of Congress, approved on July 27th, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and Arkansas to the Pacific Coast," is admitted in evidence, by reference to the same as printed in Volume 14 of the United States Statutes at Large, pages 292 and following.

Item 3. Within due time, the Atlantic and Pacific Railroad Company mentioned in the act of Congress referred to in item 2 hereof, assented to, and accepted the terms and conditions of, that act.

Item 4. The said Atlantic and Pacific Railroad Company filed maps designating its line of route with the Secretary of the Interior, which the Secretary of the Interior accepted as definitely locating the line of road, in sections and at dates as follows: From Springfield, Missouri, to the west line of Missouri, on December 17th, 1866; from the west line of Missouri to Kingfisher Creek, Indian Territory, on December 2d, 1871; from Kingfisher Creek to the eastern boundary of New Mexico, on February 7th, 1872; from the eastern boundary of New Mexico, to the western boundary of New Mexico, on March 12th, 1872; from the western boundary of New Mexico, through Arizona, to the east bank of Colorado River, near Needles, on March 12th, 1872; from the last-mentioned point on the Colorado River to township 7 north, range 7 east, San Bernardino meridian, in California, on August 15th, 1872; from the last-mentioned point (township 7 north, range 7 east) to the west line of Los Angeles County, in California, on March 12th, 1872; and from the last-mentioned point to the Pacific Coast, at San Bernardino, on August 15th, 1872. As such maps were filed, as aforesaid, the Secretary of the Interior transmitted them to the Commissioner of

the General Land Office, directing that they be given proper action; except that the said two maps filed on August 15th, 1872, were transmitted by the Secretary of the Interior to the commissioner on April 16th, 1874, without express direction.

Item 5. Under direction of the Secretary of the Interior, the Commissioner of the General Land Office, on April 22d, 1872, withdrew from pre-emption or homestead entry, private sale or location, all odd numbered sections of public land in California lying within twenty miles and thirty miles on each side of the line of route designated upon the maps referred to in item 4 hereof as filed on March 12th, 1872, which were not reserved, sold, granted or otherwise appropriated, and were free from pre-emption, or other claims or rights, on March 12th, 1872; and on November 23d, 1874, the said commissioner, under direction of the Secretary of the Interior, withdrew from sale or entry all odd numbered sections of public land in California lying within twenty miles and thirty miles on each side of the line of route designated upon the maps referred to in Item 4 hereof as filed on August 15th, 1872, saying in his said order of withdrawal of November 23d, 1874, that the rights of the Atlantic and Pacific Railroad Company must attach to the lands so withdrawn, as of August 15th, 1872.

Item 6. The withdrawals referred to in the next preceding paragraph hereof, were accompanied by

plats showing the line of route in California designated by the maps referred to in Item 4 hereof, with 20-mile limit lines and 30-mile limit lines parallel with and on each side of the said line, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 7. The Atlantic and Pacific Railroad Company did not construct any railroad in California.

Item 8. The act of Congress, approved on July 6th, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of its road, and for other purposes," is admitted in evidence, by reference to the same as printed in volume 24 of the United States Statutes at Large, pages 123 and following.

Subdivision III.

Item 9. The Southern Pacific Railroad Company mentioned in the act of Congress referred to in Item 2 hereof, was duly incorporated and organized as such, under the laws of California, on December 2d, 1865, and the said company was thereby authorized and empowered to construct, own, maintain and operate a railroad from the Bay of San Francisco, thence through the counties of San Francisco, Santa Clara, Monterey, San Luis Obispo, Tulare, and Los

Angeles to the town of San Diego, thence easterly through San Diego County to the Colorado River.

Item 10. Within due time, the said Southern Pacific Railroad Company duly assented to, and accepted the terms and conditions of, the act of July 27th, 1866, mentioned in Item 2 hereof.

Item 11. On January 3d, 1867, the said Southern Pacific Railroad Company filed with the Secretary of the Interior a map designating a line of general route of the railroad which it claimed the right and authority to construct under the provisions of the act of Congress of July 27th, 1866, referred to in Item 2 hereof; which line of route as designated on the said map, commenced in the city of San Francisco and extended thence by way of San Jose, Gilroy, Tres Pinos, Alcalde, Huron, Goshen and Mojave, to the Colorado River, at or near Needles.

Item 12. On January 3d, 1867, the Secretary of the Interior received and filed the map referred to in Item 11 hereof, and on that day delivered it to the Commissioner of the General Land Office with directions that the said map be given appropriate official action.

Item 13. On March 22d, 1867, the Commissioner of the General Land Office, acting under direction of the Secretary of the Interior's letter dated March 19th, 1867, withdrew all odd numbered sections of public land lying within twenty miles and thirty miles on each side of the line of route shown on the

map set forth in Item 11 hereof, from sale or location, pre-emption or homestead entry. The Secretary of the Interior in his above-mentioned letter of March 19th, 1867, after directing the withdrawal, said:

"I do not think it necessary at this time to pass upon the question as to whether this railroad company have adopted the route of any other railroad. Any indemnity of grant arising out of conflict of location under the first provision the third section of the Act, will be reserved for future consideration."

Item 14. The withdrawal referred to in the next preceding paragraph hereof, was accompanied by a map showing the line of general route designated on the map set forth in Item 11 hereof, with 20-mile limit lines and 30-mile limit lines parellel with and on each side of the said line of route, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 15. On July 14th, 1868, the Secretary of the Interior rendered a decision wherein he held that the Southern Pacific Railroad Company was not lawfully authorized to construct a railroad along the line of route designated upon the map of January 3d, 1867, set forth in Item 11 hereof, and ordered the withdrawals referred to in Item 13 here-

of, set aside; on August 20th, 1868, the Secretary of the Interior vacated the said order of July 14th, 1868, as to all lands south of San Jose; on November 2d, 1869, the Secretary of the Interior revoked the said order of August 20th, 1868, and directed restoration of the lands withdrawn on March 22d, 1867; on November 11th, 1869, upon review, Secretary Cox affirmed his said order of November 2d, 1869, and directed restoration of the said lands after sixty days publication; on December 15th, 1869, Secretary Cox suspended the said orders of restoration made on November 2d, 1869, and November 11th, 1869; and on July 26th, 1870, the Secretary of the Interior directed that the original withdrawals of March, 1867, set forth in Item 13 hereof, be respected.

Item 16. The act of Congress, approved on June 25th, 1868, entitled "An act relative to filing reports of railroad companies," is admitted in evidence, by reference to the same as printed in volume 15 of the United States Statutes at Large, page 79.

Item 17. The act of Congress, approved on July 25th, 1868, entitled "An Act to extend the time for the construction of the Southern Pacific Railroad in the State of California," is admitted in evidence, by reference to the same as printed in volume 15 of the United States Statutes at Large, page 187.

Item 18. Prior to the year 1869, the San Francisco and San Jose Railroad Company, was duly incorporated and organized under the laws of California, and thereby authorized to construct a railway from San Francisco to San Jose.

Item 19. During the year 1869, the said San Francisco and San Jose Railroad Company constructed and fully equipped a railroad from San Francisco to San Jose; during the same year the said Southern Pacific Railroad Company constructed and fully equipped a continuation of the said railroad from San Jose to Gilroy, a distance of 30.26 miles; and during the years 1869 and 1870 the said Southern Pacific Railroad Company constructed and fully equipped a further continuation of the said railroad from Gilroy to Tres Pinos, a distance of more than 20 miles. All of the said railroad from San Francisco to Tres Pinos was constructed upon, or as nearly as practicable upon, the line designated on the map of January 3d, 1867, set forth in Item 11 of this statement.

Item 20. By an act, approved on March 1st, 1870, entitled "An Act relating to certificates of incorporation," the legislature of California provided as follows:

"Section 1. Any incorporation now or hereafter organized under the laws of this State may amend its articles of association, or certificate of incorporation, by a majority vote of the board of directors,

or trustees, and by a vote or written assent of the stockholders representing at least two-thirds of the capital stock of such corporation; and a copy of the said articles of association or certificate of incorporation as thus amended, duly certified to be correct by the president and secretary of the board of directors, or trustees of such corporation, shall be filed in the same office, or offices, where the original articles of certificate are required by law to be filed; and from the time of filing such copy of the amended articles or certificates, such corporation shall have the same powers, and it and the stockholders thereof shall be thereafter subject to the same liabilities as if such amendment had been embraced in the original articles or certificate; provided, that the time of the existence of such corporation shall not be thereby extended beyond the time fixed in the original articles or certificate; and provided, further, that such original and amended articles or certificate shall, together, contain all the matters and things required by the law under which the original articles of association or certificate of incorporation were executed and filed; and provided further, that nothing herein contained shall be construed to cure or amend any defect existing in any original certificate of incorporation heretofore filed, by reason of the failure of such certificate to set forth matters required by law to make the same

valid as a certificate of incorporation at the time of the filing thereof; also provided, that unless the vote or written assent of all the stockholders has been obtained, then a notice of the intention to make such amendment shall first be advertised for sixty days, in some newspaper in the town or county in which the principal place of business of said company is located; and the written protest of any one of said stockholders, or his duly authorized agent or attorney, whose assent has not been obtained, filed with the secretary of the said company, shall, unless withdrawn, be effectual to prevent the adoption of such amendment; provided, that nothing in this Act shall be construed to authorize any corporation to diminish its capital stock.

Sec. 2. This Act shall take effect and be in force after its passage."

Item 21. By an act approved on April 4th, 1870, entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company," the legislature of California enacted as follows:

"Section 1. Whereas, by the provisions of a certain act of Congress of the United States of America, entitled an act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the State of California, approved July twenty-seventh, eighteen

hundred and sixty-six, certain grants were made to, and certain rights, privileges, powers and authorities were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the State of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of Congress, and all other acts of Congress now in force or which may hereafter be enacted, the State of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new amendatory articles of association; and the right, power and privilege is hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in the said acts of Congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power and authority conferred upon, granted to or vested in said company by the act of Congress and any act of Congress which may be hereafter enacted.

Sec. 2. This act shall take effect and be in force from and after its passage."

Item 22. The Joint Resolution of Congress, approved on July 28th, 1870, entitled "Joint Resolution concerning the Southern Pacific Railroad of California," is admitted in evidence, by reference to the same as printed in Volume 16 of the United States Statutes at Large, page 382.

Item 23. On October 11, 1870, articles of association, amalgamation and consideration were made and entered into, in due conformity to and compliance with the laws of California, by and between the said Southern Pacific Railroad Company and San Francisco and San Jose Railroad Company, whereby it was provided that the last named company was amalgamated and consolidated with the said Southern Pacific Railroad Company, under the corporate name and style of Southern Pacific Railroad Company, and that the said Southern Pacific Railroad Company thereby became the owner of all stock and property of the said San Francisco and San Jose Railroad Company; and the said articles further provided that the Southern Pacific Railroad Company was authorized to purchase, construct, maintain, own and operate a railroad from the city of San Francisco through the counties of San Francisco, San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to the Colorado River, and

such branch line railroads as its Board of Directors might deem advantageous.

Item 24. The said Southern Pacific Railroad Company never constructed any railroad between Tres Pinos and Alcalde, a distance of about fifty miles.

Item 25. The said Southern Pacific Railroad Company completed the construction of, and fully equipped, a continuous line of railroad from Tres Pinos, by way of Huron, Goshen and Mojave, to junction with the Atlantic and Pacific Railroad, on the Colorado River, at Needles, in several sections, on or about the following dates: The 17th section, 20.559 miles, from Tres Pinos (in NE. ¼ of section 23, township 21 south, range 14 east, M. D. M.) to a point in the NW. ¼ of section 11, township 20 south, range 17 east, M. D. M., on July 16th, 1888; the 9th section, 20 miles, from the last-mentioned point to the NE. ¼ of section 2, township 19 south, range 20 east, M. D. M., on January 9th, 1877; the 8th section 20 miles, from the last-mentioned point to Goshen (in section 19, township 18 south, range 24 east, M. D. M.), on December 11th, 1876; the 3d section 20 miles, from Goshen to the NW. ¼ of section 30, township 21 south, range 25 east, M. D. M., on June 30th, 1872; the fourth section, 20 miles, from the last-mentioned point, to the NW. ¼ of section 2, in township 25 south, range 25 east M. D. M., on June 30th, 1873; the 5th section, 20 miles, from the last-mentioned point

to the NE. ¼ of section 9, township 28 south, range 26 east, M. D. M., on June 13th, 1874; the 6th section, 20 miles, from the last-mentioned point to the NE. ¼ of section 5, township 30 south, range 29 east, M. D. M., on June 10th, 1875; the 7th section, 20 miles, from the last-mentioned point to the SE. ¼ of section 33, township 30 south, range 31 east, M. D. M., an January 13th, 1876; the 10th section, 41.66 miles, from the last-mentioned point to Mojave (in the NE. ¼ of section 17, township 11 north, range 12 west, S. B. M.), on December 17th, 1877; the 11th section, 12th section, 13th section, 14th section, 15th section, and 16th section, in all 242.507 miles, connecting with the 10th section at Mojave, and extending thence to the Colorado River, at or near Needles, all constructed prior to April 19th, 1883.

Item 26. Commissioners, duly appointed for that purpose, examined all of the said railroad from San Jose to Tres Pinos and from Alcalde to the Colorado River, at or near Needles, after construction, respectively, of each of the said several sections thereof, and duly reported to the Secretary of the Interior that each of said sections had been completed in a good, substantial and workmanlike manner, as near as may be along the line indicated on the map of January 3d, 1867, set forth in Item 11, of this stipulation, in all respects as required by the said Act of July 27th, 1866, and recommended that the same be accepted and

approved; each of which reports was accompanied by a map of the survey, location and profile of the section of road as constructed and reported upon, duly verified by the proper officers of the said Southern Pacific Railroad Company as a map and profile of such railroad as finally located and constructed and as correctly showing the location thereof, with the approval of the said Commissioners endorsed upon the maps; and each of said reports and maps were accepted and approved by the Secretary of the Interior. Such reports were made, and maps approved by the Commissioners, and said reports and maps were received, filed and approved by the Secretary of the Interior, on the following dates: 1st section (San Jose to Gilroy), report made and maps approved by the Commissioners, on October 29th, 1870, report and map approved by the Secretary on January 20th, 1871; 2d section (Gilroy to Tres Pinos), report made and maps approved by the Commissioners on September 12th, 1871, report and map approved by the Secretary on October 13th, 1871; 3d section, report made and map approved by the Commissioners on September 14th, 1872, report and map approved by the Secretary on September 28th, 1872; 4th section, report made and map approved by the Commissioners on July 23d, 1873, report and map approved by the Secretary on August 5th, 1873; 5th section, report made and map approved by the Commissioners on Septem-

ber 19th, 1874, report and map approved by the Secretary on October 9th, 1874; 6th section, report and map approved by the Commissioners on August 3d, 1875, report and may approved by the Secretary on August 21st, 1875; 7th section, report made and map approved by the Commissioners on May 27th, 1876, report and map approved by the Secretary on June 14th, 1876; 8th section, report made and map approved by the Commissioners on January 2d, 1877, report and map approved by the Secretary on January 22d, 1877; 9th section, report made and map approved by the Commissioners on February 9th, 1877, report and map approved by the Secretary, on February 20th, 1877; 10th section, report made and map approved by the Commissioners on January 30th, 1878, report and map approved by the Secretary, on February 11th, 1878; 11th section, 12th section, 13th section, 14th section, 15th section, and 16th section, reports made and maps approved by the Commissioners on December 27th, 1884, reports and maps received and filed by the Secretary on January 7th, 1885, and approved by the Secretary on September ——, 1897; 17th section, report made and map approved by the Commissioners on April 2d, 1889, report and map approved by the Secretary on October 23d, 1889.

Subdivision IV.

Item 27. The Act of Congress, approved on March 3d, 1871, entitled "An Act to incorporate the Texas

Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," is admitted in evidence by reference to the same as printed in Volume 16 of the United States Statutes at Large, pages 573, and following:

Item 28. On May 16th, 1871, the Board of Directors of the Southern Pacific Railroad Company adopted a resolution accepting the terms, conditions, and impositions of the Act of Congress mentioned in the next preceding paragraph hereof, and directing that a copy thereof, certified under the seal of said Company, be forwarded to and filed with the Secretary of the Interior, and on February 25th, 1887, a copy of the said resolution, certified by the Secretary of the said Company, under the corporate seal of the said Company, was filed with the Secretary of the Interior.

Item 29. On April 3d, 1871, the said Southern Pacific Railroad Company filed with the Secretary of the Interior a map designating the line of general route of the railroad which it claimed the right and authority to construct under the provisions of the said Act of March 3d, 1871; which map the Secretary of the Interior on that day received, filed and delivered to the Commissioner of the General Land Office, with directions that the same be given appropriate action.

Item 30. On April 21st, 1871, the Commissioner of the General Land Office, under direction of the Secretary of the Interior, withdrew all odd-numbered sections of public land, lying within twenty miles and thirty miles on each side of the line of route shown on the map referred to in Item 29 hereof, from sale or location, pre-emption or homestead entry.

Item 31. The withdrawal referred to in Item 30 hereof, was accompanied by a plat showing the line of general route designated on the map set forth in Item 29 of this stipulation, with 20-mile limit lines and 30-mile limit lines, parallel with, and on each side of the said line of route, as such limit lines were established by the Commissioner of the General Land Office under direction of the Secretary of the Interior.

Item 32. On April 15th, 1871, the said Southern Pacific Railroad Company, duly conforming to and complying with the laws of California, amended its articles of incorporation as they then existed, so as to include therein a particular description of the line of route designated on the plat set forth in Item 29 hereof.

Item. 33. The said Southern Pacific Railroad Company completed the construction of, and fully equipped, a continuous railroad from Mojave, by way of Los Angeles, to the Colorado River, at or near Yuma, in several sections, along or near the line

designated on the said general route map of April 3d, 1871, all prior to December 6th, 1877.

Item 34. Commissioners, duly appointed for that purpose, examined all of the said railroad after constructions, respectively, of each of the several sections thereof, and duly reported to the Secretary of the Interior that each of said sections had been completed in a good, substantial and workmanlike manner, in all respects as required by the said act of March 3d, 1871; and recommended that the same be accepted and approved; each of which reports was accompanied by a map of the survey, location and profile of the section of road as constructed and reported upon; duly verified by the proper officers of the Southern Pacific Railroad Company, as a map and profile of such railroad as finally located and constructed, and showing the correct location thereof, with the approval of the said Commissioners endorsed upon the maps. The said reports were made and maps approved by the Commissioners, and the said reports and maps were filed and approved by the Secretary of the Interior, and approved by the President of the United States, on the following dates: 1st section (from a point in the NW. ¼ of section 3, township 2 north, range 15 west, S. B. M., to a point in the NE. ¼ of section 27, township 1, south, range 9 west, S. B. M., a distance of 50 miles), report made and map approved by the Commissioners on April 15th, 1874, report and map

filed and approved by the Secretary of the Interior on May 8th, 1874, and report approved by the President of the United States on May 9th, 1874; 2d section (from the said point in the NE. ¼ of section 27, township 1 south, range 9 west, S. B. M., to a point in the SW. ¼ of section 4, township 3 south, range 1 west, S. B. M., a distance of 50 miles), report made and map approved by the Commissioners on October 21st, 1875, report and map filed and approved by the Secretary on November 8th, 1875, and report approved by the President on November 11th, 1875; 3d section (from the said point in the SW. ¼ of section 4, township 3, south, range 1 west, S. B. M., to a point in the SW. ¼ of section 24, township 5 south, range 7 east, S. B. M., a distance of 50 miles), report made and map approved by the Commissioners on June 22d, 1876, report and map filed and approved by the Secretary on July 10th, 1876, and report approved by the President on July 21st, 1876; 4th section (from the said point in the NW. ¼ of section 3, township 2 north, range 15 west, S. B. M., to a point in the NE. ¼ of section 17, township 11 north, range 12 west, S. B. M., a distance of 78.59 miles), report made and map approved by the Commissioners on February 17th, 1877, report and map filed and approved by the Secretary on March 1st, 1877, and report approved by the President on March 2d, 1877; 5th section (from the said point in the SW. ¼ of section 24, township 5

south, range 7 east, S. B. M., to a point in the SE. ¼ of section 26, township 16 south, range 22 east, on the Colorado River, a distance of 118.37 miles), report made and map approved by the commissioners on December 6th, 1877, report and map filed and approved by the Secretary on January 19th, 1878, and report approved by the President on January 23d, 1878.

Subdivision V.

Item 35. The northeast quarter of northeast quarter (NE. ¼ of NE. ¼) of section seven (7), in township six (6) north, range eight (8) west, San Bernardino Base and Meridian, is situated within primary limits of the land grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3d, 1871; but the said land is not within either primary or indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 36. The west half (W. ½) of section thirty-one (31), in township nine (9) north, range fifteen (15) west, San Bernardino base and meridian, is situated within indemnity limits of the land grant made unto the Atlantic & Pacific Railroad Company by the

hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3d, 1871; but the said land is not within either primary or indemnity limits of the land grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 37. The lands described in Item 35 and Item 36 of this Stipulation as to Evidence, were patented by the United States unto the Southern Pacific Railroad Company by patent dated June 30th, 1903, pursuant to said Company's indemnity selection thereof as indemnity lands of its said March 3d, 1871, land grant, by List No. 93, in due form, filed in the Los Angeles land office on November 10th, 1902.

Item 38. It appears from the records of the United States Land Office, for the Los Angeles District of California, that within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the Act of Congress of March 3d, 1871, there remains more than 50,000 acres of surveyed public land, vacant of record, embraced in the odd-numbered sections returned as agricultural in character, which have not been selected as indemnity by said Company, not including any lands embraced within either the granted limits or indemnity limits of the grant to the

Atlantic and Pacific Railroad Company, made by the Act of Congress of July 27th, 1866.

Item 39. The official "Land Office Report. 1875," at page 409, contains the following "Statement exhibiting land concessions by Acts of Congress to States and Corporations, etc.": Act Mar. 3, 1871, 16 Stats. 579, Southern Pacific Railroad Company, Estimated quantity embraced within the 20 and 30 mile limits of the grant, 3,520,000 acres; Estimated quantity which the company will receive from the grant, within the 20 and 30 mile limits thereof, 3,000,000 acres.

Item 40. On July 23d, 1885, the said Southern Pacific Railroad Company sold, under contract for deed No. 4722, for the full sum of $308.00 cash in hand that day paid, all of the land described in Item 36 of this Stipulation as to Evidence, unto the Atlantic & Pacific Fibre Importing and Manufacturing Company, a foreign corporation; and by instrument in writing bearing date January 27th, 1893, the said Atlantic & Pacific Fibre Importing and Manufacturing Company assigned the said contract, and its interest in the lands therein described, unto Jackson Alpheus Graves, a citizen of the United States.

Subdivision VI.

Item 41. Either party to this suit may introduce

further and additional testimony or other evidence, at any time within ninety days from this date.

Agreed to and signed on November 21st, 1905.

JOSEPH H. CALL,
Special Assistant U. S. Attorney.

WM. SINGER, Jr.,
Attorney for said Defendants.

WM. F. HERRIN,
ALBERT RATHBONE,
Counsel for the said Defendants.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States, vs. Southern Pacific Railroad Co., et al. Stipulation as to Evidence. Filed Nov. 24, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., 1127 Merchants' Exchange, San Francisco, Cal., Atty. for Defendants.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,
Complainant,
vs.
SOUTHERN PACIFIC RAILROAD CO., et al.,
Defendants.

Report of Special Examiner.

To the Honorable, the Judges of the Circuit Court of the United States, in and for said District:

Pursuant to an order of reference made and entered in the above-entitled cause upon the 18th day of December, 1905, whereby it is ordered that the undersigned, as Special Examiner in Chancery, should take the evidence in the above-entitled cause and report the same to the Court, and said Special Examiner does now submit this, his report, as follows:

That the complainant appeared before the undersigned on the 16th day of February, 1906, at the office of Joseph H. Call, Esq., Room 316-4 Tajo Building, at Los Angeles, California, by said Joseph H. Call, Esq., Special Assistant United States Attorney, and the defendants appeared at the same time and place by their solicitor, Guy Shoup, Esquire; and thereupon the parties entered into the stipulation which was made a part of and is annexed to the record accompanying this report, and complainant introduced in evidence exhibits marked Complainant's Exhibits "K" and "L," respectively.

And the said record accompanying this report contains all of the evidence and exhibits introduced in said cause by the respective parties, together with the stipulations entered into, before me as Special Ex-

aminer; all of which, with the exhibits introduced, is now herewith returned to the Court.

LEO LONGLEY,
Special Examiner in Chancery.

Dated May 24, 1906.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,
Complainant,

vs.

SOUTHERN PACIFIC RAILROAD CO., et al.,
Defendants.

Testimony.

Testimony taken by consent of parties before Leo Longley, Special Examiner and Stenographer, in the city of Los Angeles, California, on February 16th, 1906.

Appearances:

Mr. JOSEPH H. CALL, Special United States Attorney, for Complainant.

Mr. GUY SHOUP, for the Defendants, except D. O. Mills.

Case No. 1196.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

UNITED STATES,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, and Others,

Defendants.

Further Stipulation as to Evidence.

It is stipulated by and between the parties to this case, subject to all valid objections as to materiality and relevancy, as follows:

1. On or about April 1st, 1875, by instrument in writing bearing that date, the Southern Pacific Railroad Company made, executed and delivered unto D. O. Mills and Lloyd Tevis, as trustees, a mortgage covering railroads, depots, rolling stock and other property, together with lands therein described as being the odd-numbered sections of land granted to the Southern Pacific Railroad Company, and which might be lawfully selected by that company as indemnity lands, by and under the grant and provisions of the Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the State of Missouri and Ar-

kansas to the Pacific Coast," approved July 27th, 1866, and the act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3d, 1871; which mortgage was given to secure the payment of negotiable bonds issued and to be issued and sold, of face value of forty-six million (46,000,000) dollars, each bond payable thirty (30) years after date thereof, and to bear six (6) per cent interest.

Bonds were issued, and sold for value to many different individual purchasers in the United States, England and elsewhere, prior to the year 1896; and at the time this suit was brought such bonds so sold of the face value of more than ten million (10,000,000) dollars were outstanding, unpaid.

The defendant Homer S. King, trustee, was duly substituted as trustee under the said mortgage, in place and stead of the said Lloyd Tevis, trustee, prior to the commencement of this suit.

2. On or about September 15th, 1893, by instrument in writing bearing that date, the Southern Pacific Railroad Company made, executed and delivered unto the defendant Central Trust Company of New York, a corporation, as trustee, a second mortgage covering said railroads, depots, rolling stock and other property, together with lands therein described as the several sections of land described in

the said first mortgage of April 1st, 1875; which mortgage was given to secure the payment of negotiable bonds, issued and to be issued and sold, of face value not to exceed fifty-eight million (58,000,000) dollars, each bond payable on November 1st, 1937, and to bear five (5) per cent interest.

Bonds were issued, and sold for value to many different individual purchasers in the United States, England and elsewhere, prior to the year 1896; and at the time this suit was brought, such bonds so sold of the face value of more than twenty million (20,000,000) dollars were outstanding, unpaid.

Made and signed on February 16th, 1906.

JOSEPH H. CALL,
Special Assistant U. S. Attorney.
WM. SINGER, Jr.
Attorney for all Defendants other than D. O. Mills.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States vs. Southern Pacific Railroad Co. et al. Further Stipulation as to Evidence. Wm. Singer, Jr., Atty. for Defendants.

Mr. CALL.—The parties enter into the following stipulation which I hereby request be made part of the record.

The stipulation last referred to is as follows: Case No. 1196. United States Circuit Court, Ninth Circuit, Southern District of California, Southern

Division. United States, Plaintiff, vs. Southern Pacific Railroad Company, and others, Defendants. Further Stipulation as to Evidence. It is stipulated by and between the parties to this case, subject to all valid objections as to materiality and relevancy, as follows::

1. On or about April 1st, 1875, by instrument in writing bearing that date, the Southern Pacific Railroad Company made, executed and delivered unto D. O. Mills and Lloyd Tevis, as trustees, a mortgage covering railroads, depots, rolling stock and other property, together with lands therein described as being the odd-numbered sections of land granted to the Southern Pacific Railroad Company, and which might be lawfully selected by that company as indemnity lands, by and under the grant and provisions of the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," approved July 27th, 1866, and the Act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3d, 1871; which mortgage was given to secure the payment of negotiable bonds issued and to be issued and sold, of face value of forty-six million (46,000,000) dollars, each bond payable thirty (30) years after date thereof, and to bear six (6) per cent interest.

Bonds were issued, and sold for value to many different individual purchasers in ths United States, England and elsewhere, prior to the year 1896; and at the time this suit was brought such bonds so sold of the face value of more than ten million (10,000,000) dollars were outstanding, unpaid.

The defendant Homer S. King, trustee, was duly substituted as trustee under the said mortgage, in place and stead of the said Lloyd Tevis, trustee, prior to the commencement of this suit.

2. On or about September 15th, 1893, by instrument in writing bearing that date, the Southern Pacific Railroad Company made, executed and delivered unto the defendant Central Trust Company of New York, a corporation, as trustee, a second mortgage covering said railroads, depots, rolling stock and other property, together with lands therein described as the several sections of land described in the said first mortgage of April 1st, 1875; which mortgage was given to secure the payment of negotiable bonds, issued and to be issued and sold, of face value not to exceed fifty-eight million (58,000,000) dollars, each bond payable on November 1st, 1937, and to bear five (5) per cent interest.

Bonds were issued, and sold for value to many different individual purchasers in the United States, England and elsewhere, prior to the year 1896; and at the time this suit was brought, such bonds so sold

of the face value of more than twenty million (20,-000,000) dollars were outstanding, unpaid.

Made and signed on February 16th 1906. Joseph H. Call, Special Assistant U. S. Attorney. Wm. Singer, Jr., Attorney for all defendants other than D. O. Mills."

Mr. CALL.—I offer in evidence certain parts of the record in the case of United States vs. Southern Pacific Railroad Company, et al., number 184, United States Circuit Court, Southern District of California, hereby marked Complainant's Exhibit "K."

I also offer in evidence certain parts of the record in the case of United States vs. The Southern Pacific Railroad Company, et al., numbered 600, in the United States Circuit Court, Southern District of California, hereby marked Complainant's Exhibit "L."

Mr. SHOUP.—To which offer, and each offer, defendants object upon the ground that the same is irrelevant and immaterial.

Thereupon the hearing was adjourned, subject to be resumed upon reasonable notice by either side.

[Endorsed]: Filed May 24, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

Complainant's Exhibit "K."

Leo Longley, Special Examiner.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

No. 184.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

INDEX.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

The Southern Pacific Railroad Company, and D. O. Mills and Garrit L. Lansing, Trustees, The City Brick Company, Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, Julius Abrahamson, Hugo Abrahamson, Mrs. Jesus Ord de Andrade, Mrs. Thomas Allison, Mrs. Mary Backman, Mrs. Matilda L. Barber, Henry A. Barclay, E. T. Barber, Thomas N. Beck, A. M. Benham, Jesse Martin Blanchard, E. H. Blood, Ira H. Bradshaw, B. B. Briggs, Philomela T. Bunell, Frederick H. Busby, A. W. Butler, H. A. Bond, William H. Carlson, William H. Carlson, V. E. Carson, B. F. Carter, Benjamin F. Carter, Harry Chandler, Fred Chandler, Walter S. Chaffee, J. N. Chapman, F. O. Christensen, Mrs. L. C. Chormicle, Byron O. Clark, George Claussen, Clarence T. Cleve, Nicholas Cochems, Nathan Cole, Jr., Peter Cook, I. D. Cory, Seaton T. Cull, Stefano Cuneo, J. A. Dahl, Andrew J. Darling,

Thomas A. Delano, Richard Dillon, John Ditter, David Dolbeen, John F. Duehren, James F. Dunsmoor, Edward G. Durant, Robert Dunn, Henry Elms, Fairmont Land and Water Company, Farming and Fruit Land Company, George W. Fentrees, S. W. Ferguson, William Ferguson, William Freeman, Joseph W. Furnival, J. Garber, F. C. Garbutt, J. Drew Gay, F. A. Geier, Ambrose F. George, Will D. Gould, Mrs. Mary L. Gould, Thomas E. Gould, James Greton, W. F. Grosser, D. J. Haines, Herman Haines, James M. Hait, Simeon Hamberg, Jacob Harpe, Alice A. Hall, Calvin Hartwell, William T. Hamilton, William T. Hamilton, James Hamilton, Peter Hamilton, John C. Haskell, John C. Hay, Mary Jackson Hall, Julius Heyman, J. M. Hill, John D. Hoffman, August Hoelling, J. F. Holbrook, W. R. Hughes, George A. Hunter, J. F. Houghton, E. J. Ismert, W. W. Jenkins, Thomas J. Johannsen, M. D. Johnson, John T. Jones, A. S. Joseph, John Kenealey, Frederick Kenworthy, Richard Kichline, Joseph Kurtz, Charles Kutschmar, Mrs. Ammoretta J. Lanterman, T. B. Lawhead, L. B. Lawson, Lawson M. La Fetra, Stephen L. Leighton, Miguel Leonis, George Loomis, George Loomis, Marion C. Loop, Pablo Lopez,

Daniel Luce, G. W. Mack, John B. Martin, Cora L. Mathiason, Ezra May, Angus S. McDonald, A. M. Melrose, Mrs. Flossy Melrose, W. E. McVay, Thomas Menzies, J. G. Miller, John Million, Mrs. Mamie O. Million, H. H. Mize, Thomas F. Mitchell, W. H. Mosely, L. E. Mosher, Joseph Mullally, Andrew Myers, D. C. Newcomb. Albert E. Nettleton, North Pasadena Land and Water Company, James O'Reilly, George L. Ott, Pacific Coast Oil Company, J. H. Painter, M. D. Painter, Mrs. Annie Palen, J. R. Pallett, W. A. Pallett, T. A. Pallett, C. O. Parsons, F. W. Pattee, James Peirano, John J. Peckham, Ramon Perea, Daniel Phelan, Edward E. Perley, McH. Pierce, William Pisch, R. M. Pogson, A. W. Potts, Lafayette S. Porter, A. J. Praster, F. H. Prescott, Lewis H. Price, Charles Raggis, W. B. Ralphs, James B. Randol, C. P. Randolph, F. M. Randolph, Francisco Real, George H. Reed, John Rea, Otto Rinderknecht, Felipe Rivera, James Robertson, George D. Rowan, S. D. Savage, Jacob Scherer, George W. Seifert, Luciano Sequois, Henry C. Shearman, Henrietta Shirpser, Rebecca Jetta Shirpser, David Shirpser, Max Shirpser, Gianbatista Sinaco, J. S. Slauson, J. Wallen Smith, Mrs. Maggie Smith, E. Sommer, W.

A. Spencer, H. G. Stevenson, H. J. Stevenson, M. W. Stimson, Robert Strathearn, R. P. Strathearn, Eleanor Sussman, D. M. Sutherland, John Sweeney, W. H. Taggart, James R. Taylor, Mary G. Tongier, James R. Townsend, Mrs. C. L. True, L. Tunison, J. S. Turner, George S. Umpleby, F. Veysset, George Vilas, Alden R. Vining, Daniel A. Wagner, S. A. Waldron, W. W. Wallace, C. H. Watts, Mrs. Julia J. Wheeler, A. C. Whitacre, M. L. Wicks, Moye Wicks, Mrs. Jennie L. Wicks, Mary C. Williams, C. N. Wilson, Robert N. C. Wilson, J. Youngblood,

Defendants.

Amended Bill of Complaint on Case No. 184.

To the Judges of the Circuit Court of the United States, for the Southern District of California:

I.

The United States of America, by the Attorney-General thereof, by an order of Court first had and obtained, brings this its amended bill of complaint against: The Southern Pacific Railroad Company, acting as a corporation under and by virtue of the authority hereinafter set forth; D. O. Mills and Garrit L. Lansing, trustees, the City Brick Company, a corporation organized and existing under and by virtue of the general laws of the State of California;

the Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, a corporation organized and existing under and by virtue of the laws of Great Britain, The Fairmont Land and Water Company, the Farming and Fruit Land Company, the North Pasadena Land and Water Company, and The Pacific Coast Oil Company, each a corporation organized and existing under and by virtue of the laws of California; and Julius Abrahamson, Hugo Abrahamson, Mrs. Jesus Ord de Andrade, Mrs. Thomas Allison, Mrs. Mary Bachman, Mrs. Matilda L. Barber, Henry A. Barclay, E. T. Barber, Thomas N. Beck, A. M. Benham, Jesse Martin Blanchard, E. H. Blood, Ira H. Bradshaw, B. B. Briggs, Philomela T. Bunnell, Frederick H. Busby, A. W. Butler, H. A. Bond, William H. Carlson, William H. Carlson, V. E. Carson, B. F. Carter, Benjamin F. Carter, Harry Chandler, Fred Chandler, Walter S. Chaffee, J. N. Chapman F. O. Christensen, Mrs. L. C. Chormicle, Byron O. Clark, George Claussen, Clarence T. Cleve, Nicholas Cochems, Nathan Cole, Jr., Peter Cook, I. D. Cory, Seaton T. Cull, Stefano Cuneo, J. A. Dahl, Andrew J. Darling, Thomas A. Delano, Richard Dillon, John Diter, David Dolbeen, John F. Duehren, James F. Dunsmoor, Edward G. Durant, Robert Dunn, Henry Elms, George W. Fentrees, S. W. Ferguson, William Ferguson, William Freeman, Joseph W. Furnival, J. Garber, F. C. Garbutt, J.

Drew Gay, F. A. Geier, Ambrose F. George, Will D. Gould, Mrs. Mary L. Gould, Thomas E. Gould, James Greton, W. F. Grosser, D. J. Haines, Herman Haines, James M. Hait, Simeon Hamberg, Jacob Harpe, Alice A. Hall, Calvin Hartwell, William T. Hamilton, William T. Hamilton, James Hamilton, Peter Hamilton, John C. Haskell, John John C. Hay, Mary Jackson Hall, Julius Heyman, J. M. Hill, John D. Hoffman, August Hoelling, J. F. Holbrook, W. R. Hughes, George A. Hunter, J. F. Houghton, E. J. Ismert, W. W. Jenkins, Thomas J. Johannsen, M. D. Johnson, John J. Jones, A. S. Joseph, John Kenealey, Frederick Kenworthy, Richard Kichline, Joseph Kurtz, Charles Kutschmar, Mrs. Ammoretta J. Lanterman, T. B. Lawhead, L. B. Lawson, Lawson M. La Fetra, Stephen L. Leighton, Miguel Leonis, George Loomis, George Loomis, Marion C. Loop, Pablo Lopez, Daniel Luce, G. W. Mack, John B. Martin, Cora L. Mathiason, Ezra May, Angus S. McDonald, A. M. Melrose, Mrs. Flossie Melrose, W. E. McKay, Thomas Menzies, J. G. Miller, John Million, Mrs. Mamie O. Million, H. H. Mize, Thomas F. Mitchell, W. H. Mosely, L. E. Mosher, Joseph Mullally, Andrew Meyers D. C. Newcomb, Albert E. Nettleton James O'Rielly, George L. Ott, J. H. Painter, M. D. Painter, Mrs. Annie Palen, J. R. Pallett, W. A. Pallett, T. A. Pallett, C. O. Parsons, F. W. Pattee, James

Peirano, John J. Peckman, Ramon Perea, Daniel Phelan, Edward E. Perley, McH. Pierce, William Pisch, E. M. Pogson, A. W. Potts, Lafayette S. Porter, A. J. Praster, F. H. Prescott, Lewis H. Price, Charles Raggis, W. B. Ralphs, James B. Randol, C. P. Randolph, F. M. Randolph, Francisco Real, George H. Reed, John Rea, Otto Rinderknecht, Felipe Rivera, James Robertson, George D. Rowan, S. D. Savage, Jacob Scherer, George W. Seifert, Luciano Sequois, Henry C. Sherman, Henrietta Shirpser, Rebecca Jetta Shirpser, David Shirpser, Max Shirpser, Gianbatista Sinaco, J. S. Slauson, J. Wallen Smith, Mrs. Maggie Smith, E. Sommer, W. A. Spencer, H. G. Stevenson, H. J. Stevenson, M. W. Stimson, Robert Strathearn, R. P. Strathearn, Eleanor Sussman, D. M. Sutherland, John Sweeney, W. H. Taggart, James P. Taylor, Mary G. Tongier, James R. Townsend Mrs. C. L. True, L. Tunison, J. S. Turner, George S. Umpleby, F. Veysset, George Villas, Alden R. Vining, Daniel A. Wagner, S. A. Waldron, W. W. Wallace, C. H. Watts, Mrs. Julia J. Wheeler, A. C. Whitacre, M. L. Wicks, Moye Wicks, Mrs. Jennie L. Wicks, Mary C. Williams, C. N. Wilson, Robert N. C. Wilson, and J. Youngblood; and each of said defendants being a citizen of the State of California, and residing therein, except said Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, which, as your orator al-

leges upon its information and belief, is a citizen of Great Britain, and a British subject.

And thereupon your orator alleges and shows unto the Court that the lands hereinafter described were acquired by the United States of America from Mexico in the year of 1846, and the title to said lands were confirmed to your orator by treaty of Gualalupe Hidalgo, in the year of 1848; and all of said lands were then, ever since have been and now are owned by the United States, by title in fee simple, and your orator during all of said times has been, and now is, in possession thereof; said lands being described as follows, to wit:

All of the sections of land designated by odd numbers in townships three (3) and four (4) north, ranges five (5), six (6) and seven (7) west; township one (1) north, ranges sixteen (16) seventeen (17) and eighteen (18) west; townships six (6) and south three-fourths of township seven (7) north, ranges eleven (11) twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18) and nineteen (19) west; also all the sections of land designated by odd numbers as shown by the public surveys, embraced within the townships from number two (2) north to number five (5) north, both numbers included, and ranges from number eight (8) west to number eighteen (18) west, both numbers included, except sections twenty-three (23)

and thirty-five (35) in township four (4) north, range fifteen (15) west, and except sections one (1) eleven (11) and thirteen (13), in township three (3) north, range fifteen (15) west; also the unsurveyed lands within said area which will be designated as odd numbered sections when the public surveys according to the laws of the United States shall have been extended over such townships; all the aforesaid lands being surveyed by San Bernardino Base and Meridian, and situated within the state of California.

II.

Your orator further shows that, by the Act of Congress approved July 27, 1866, entitled "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast," Congress incorporated the Atlantic and Pacific Railroad Company, and granted to said company, in aid of the construction of such railroad, a large amount of lands in the State of California and other states and territories, and to the whole of which said act your orator refers (See U. S. Statutes, Volume 14, page 292.)

Section 3 of said act provides as follows:

"That there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific

Coast, and to secure the safe and speedy transportation of mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated, by a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore

granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

And section 18 of said act provides as follows:

"Sec. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land subject to all the conditions and limitations herein provided, and shall be required to construct its road on the line regulations as to time and manner with the Atlantic and Pacific Railroad herein provided for."

Your orator further shows that said Atlantic and Pacific Railroad Company duly accepted said grant and proceeded to construct said road, and did locate on the ground and designate upon a plat or map the whole of said line of railroad under said act, from Springfield, Missouri, by way of the points and places named in said act, and in the time and manner provided in said act, to the Pacific Ocean; and on or about ———, 1866, did file such plat in the office

of the Commissioner of the General Land Office, and which designation and location was approved by the Secretary of the Interior at that time, and all the odd sections of public lands on each side of said road, for thirty miles, were thereupon withdrawn from market and reserved; including said lands in suit herein which fell within the twenty-mile limit of said line.

III.

Your orator further shows the Court that, by section 23 of an act of Congress approved March 3, 1871 (see U. S. Stats., vol. 16, p. 573), entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July 27, 1866.

"Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

IV.

Your orator further shows that, by the act of Congress approved July 6, 1886, entitled "an act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast and to restore the same to settlement, and for other purposes," all the lands and rights to lands in California theretofore granted and conferred upon the said Atlantic and Pacific Railroad Company were forfeited and resumed to the United States, and restored to the public domain, for noncompletion of that portion of said railroad to have been completed in California, no part of said road having been constructed in California.

V.

Your orator is informed and believes, and so alleges the fact to be, that the defendants herein make some claim of ownership to the lands above described, the exact nature and extent of such claims being unknown to your orator; but your orator is informed and believes, and so alleges the fact that said defendants claim said lands under and by virtue of said act

of Congress of March 3d, 1871 above set forth, granting lands to the Southern Pacific Railroad Company to aid in the construction of a railroad and telegraph line from Tehachapi Pass, via Los Angeles, to a point at or near the Colorado River, and there connect with said Texas and Pacific Railroad Company, and said defendants claim that said Southern Pacific Railroad Company did accept the terms and conditions of said grant, and did designate the route of its road between said points within the time and manner provided in said act of Congress, but your orator alleges that the designated line of route of said Southern Pacific Railroad Company so claimed and pretended to be located as aforesaid lies upon the same line as that of the Atlantic and Pacific Railroad Company, and the lands in suit herein, if said Southern Pacific Railroad Company had designated its said line of route as claimed by said defendants, would be at the place where the said routes would be upon the same general line, and such routes would have intersected each other.

VI.

Your orator further alleges that, if said Southern Pacific Railroad Company had designated its line of route from Tehachapi Pass by way of Los Angeles, to a point at or near the Colorado River as claimed by defendants herein, or between such terminal points at all, that such route would have been upon the same general line as the route of said Atlantic and Pacific

Railroad Company, located as aforesaid, and all the lands in suit herein would have fallen within the limits of the grant to each of said companies and in such overlapping limits within the twenty mile and primary limits of said Atlantic and Pacific Railroad; but your orator alleges that none of said lands were covered by said grant to said Southern Pacific Railroad Company, and none of said lands were of the category of lands which were to be granted to said company.

VII.

Your orator further alleges and shows unto the Court that all of the lands in suit herein are situated within twenty miles of the designated line of route of said Atlantic and Pacific Railroad Company and within the primary and twenty mile limits of said grant; and as respects the mineral character of said lands, and of every tract thereof, they were in the same condition in that respect during the whole of the year 1866 that they have been in at all times from that year down to and including the 3d day of April, 1871.

VIII.

Your orator is informed and believes, and so alleges the fact to be, that the claim of defendants to said lands is invalid, and not founded upon any legal or equitable right, but is a mere pretense and excuse for the defendants to trespass upon said lands.

IX.

Your orator is informed and believes, and so alleges the fact to be, that the defendants herein claim that a line of railroad and telegraph line, from Tehachapi Pass, by way of Los Angeles, to the Colorado River, has been constructed by the Southern Pacific Railroad Company within the time and in the manner provided by said act of Congress of March 3, 1871, above referred to, in which it is therein provided for the construction of a railroad and telegraph line between said points, and that commissioners appointed by the president of the United States, have reported that such railroad was constructed in all respects in compliance with said act; but your orator alleges that such claims and pretenses are unfounded, and that said Southern Pacific Railroad Company named in said act of Congress of March 3, 1871, has not constructed any railroad or telegraph line between said points within the time or manner provided by said act, nor at all.

X.

Your orator further alleges that, on December 2, 1865, a corporation was organized under the laws of the State of California, by the name and style of the Southern Pacific Railroad Company, and under a general law thereof, approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the af-

fairs thereof, and other matters relating thereto," which said act is printed in the Statutes of California of 1861, at page 607, and to which act your orator refers.

XI.

Your orator further alleges that said corporation was formed for the purpose and with the corporate power, as stated in its articles of incorporation, of constructing, owning and maintaining a railroad from some point on the Bay of San Francisco, in the State of California, and to pass through the Counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego, to the town of San Diego in said State; thence eastward, through said county of San Diego, to the eastern line of the State of California, there to connect with the contemplated railroad from the eastern line of the State of California to the Mississippi River.

XII.

Your orator further shows that, on October 11, 1870, said Southern Pacific Railroad Company entered into pretended articles of consolidation and amalgamation with the San Francisco and San Jose Railroad Company, a corporation organized under the laws of California with similar powers, and the Santa Clara and Pajaro Valley Railroad Company, also a corporation organized under the laws of California with similar powers, by which pretended

articles of consolidation and amalgamation said several companies agreed to consolidate and amalgamate their capital stock, debts, property, assets and franchises, making a different capital, issuing new stock and creating a new and different corporation by the name and style of "The Southern Pacific Railroad Company," which pretended articles were signed, published and filed in the mode as provided by said general law of California; but your orator alleges that the articles of incorporation of said railroad companies respectively, and of neither of them, authorized said companies to consolidate or amalgamate with any other railroad company; and your orator is informed and believes, and so alleges the fact to be, that such pretended consolidation was unauthorized by the laws of the State of California and without the consent of said state, and was unauthorized by the laws of the United States and without authority from the United States, and that such pretended consolidation was and is illegal and void.

XIII.

Your orator further alleges and shows unto the Court that, on the 12th day of August, 1873, said Southern Pacific Railroad Company, the corporation pretended to be created by said articles of consolidation and amalgamation of October 11, 1870, as

aforesaid, and the Southern Pacific Branch Railroad Company, a corporation organized and existing under the laws of the State of California, formed for the purpose and with the corporate power as stated in its articles of incorporation, of constructing, owning and maintaining a railroad within the State of California, did pretend to consolidate and amalgamate their capital stock, debts, franchises, and rights and did enter into pretended articles of consolidation and amalgamation, by which said two companies agreed to amalgamate and consolidate their capital stock, debts, property, assets and franchises, creating a new capital stock and issuing new certificates of stock and purporting to create a new and different corporation by the name and style of "The Southern Pacific Railroad Company," a copy of which pretended articles of consolidation and amalgamation are hereto attached, marked Exhibit "A" and made a part hereof; and did duly sign such articles and publish and file the same as required in that respect by the laws of the State of California; but your orator alleges that the articles of incorporation of said two companies respectively, and neither of them, authorized or empowered said companies or either of them to enter into any consolidation or amalgamation with any other railroad company, and did not authorize them or either of them to sell or transfer its entire railroad to any

other railroad company; and your orator alleges that such pretended articles of consolidation and amalgamation were illegal and void, and were unauthorized and prohibited by the laws of the State of California, and were unauthorized and prohibited by the laws of the United States; and were entered into without any authority from the Congress of the United States, or any other competent authority; and by entering into such pretended articles of consolidation and amalgamation said Southern Pacific Railroad Company, which was named in said act of Congress of March 3, 1871, forfeited, abandoned and released to the United States all the lands granted by said act of Congress of March 3, 1871, and all the rights, grants, franchises and privileges conferred by said act, and all right to earn or acquire any and all lands under said act.

XIV.

Your orator is informed and believes, and so alleges the fact to be, that the Southern Pacific Railroad Company which is defendant herein, claims to have pretended patents issued by the United States in due form of law to it said Southern Pacific Railroad Company, purporting to convey to said company a portion of the land in suit herein, but which lands are unknown to your orator; but your orator alleges that if any such patents were issued they were issued illegally and without any authority of law, and are illegal and void.

XV.

Your orator is informed and believes, and so alleges the fact to be, that certain of the defendants herein, but which defendants are unknown to your orator, claim to be bona fide purchasers for value from the Southern Pacific Railroad Company, the corporation named in said act of Congress of March 3, 1871, and claim that their rights to certain tracts of land are protected and confirmed by the act of Congress approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes." (See 24 Statutes, 556.)

XVI.

Your orator further alleges and shows unto the Court that defendants D. O. Mills and Garret L. Lansing have a mortgage or deed of trust from defendant Southern Pacific Railroad Company, covering or purporting to cover the above described lands, to secure the payment of certain indebtedness of said defendant company to them as trustees, which mortgage is dated April 1, 1875, and which is executed in due form of law and is recorded in Los Angeles and San Bernardino and Ventura counties, in which said lands are situated, and constitutes a cloud upon the title of your orator.

XVII.

Your orator further alleges that said lands above described are naturally timbered or wooded lands and valuable for the timber and wood thereon; and that defendants herein, while claiming and pretending to own some interest in said lands, at various and divers times during the last five years, at many and divers times to your orator unknown, have unlawfully entered upon said lands, chopped down the timber and trees thereon, then the property of your orator, and carried away such timber and trees and converted the same to their own use, the amount and value of which is unknown to your orator, and are now removing from said lands wood cut thereon, and threatening to chop down other trees on said land, and unless enjoined will do so, to the great and irreparable injury of your orator.

XVIII.

Your orator further shows that the amount in controversy in this suit exceeds the sum or value of five thousand dollars, exclusive of interest and costs.

XIX.

Your orator is informed and believes, and so alleges the fact to be, that defendant Southern Pacific Railroad Company, while pretending and claiming to own some interest in said lands, at various and divers times during the past ten years to your

orator unknown, by pretended contracts and conveyances has pretended to sell and convey large portions of said lands to the other defendants herein, the amount and descriptions of which are unknown to your orator, and has thus realized from wood and timber on said land large sums of money which it has appropriated and converted to its own use.

To the end, therefore, that said defendants may, if they can, show why your orator should not have the relief herein prayed, and to fully answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereinunder written they are respectively required to answer, that is to say:

Said defendant Southern Pacific Railroad Company is required to state: (1) the names of all of the pretended purchasers of said lands or any portion thereof from said company; (2) the amounts and descriptions of lands so pretended to be sold; (3) all moneys realized from said defendants respectively by said company; (4) each and all of said defendants are required to state the nature

and extent of their pretended claim or claims to said lands.

And to the further end, therefore, that plaintiff may have that relief which it can only obtain in a court of equity, and that said defendants may answer the premises, your orator prays that, if it shall be found that commissioners, pretending to be appointed by the President of the United States for that purpose, have reported that said pretended railroad and telegraph line from Tehachapi Pass, via Los Angeles, to the Colorado River, have been constructed and completed in a good, substantial and workmanlike manner as in all respects required by said act of March 3, 1871, heretofore referred to, and by such report that such pretended railroad has been pretended to be accepted by them or by the President of the United States, and that such pretended report or reports constitute a cloud upon the title of your orator to said lands, then your orator prays that such pretended report or reports may be set aside, annulled and canceled.

And your orator further prays that said articles of consolidation and amalgamation dated August 12, 1873, between said Southern Pacific Railroad Company and said Southern Pacific Branch Railroad Company may be set aside, annulled and canceled, and that the contract of sale therein set forth, by which the Southern Pacific Railroad Company

named in said Act of Congress of March 3, 1871, purports to sell and convey to the pretended consolidated company purported to be created by such articles of all its rights, grants, privileges, assets and property, and all the rights, grants, privileges, property, assets and lands granted and conferred by the United States by said Act of Congress of March 3, 1871, to the Southern Pacific Railroad Company therein named, may be set aside, annulled and canceled.

And your orator further prays that said mortgage and deed of trust executed by said Southern Pacific Railroad Company, defendant herein, to D. O. Mills and Garrit L. Lansing as trustees, may be set aside, annulled and canceled.

And your orator further prays that its title to said lands may be quieted, and that defendants and each of them be barred and estopped from having asserting or claiming any right, title or interest therein adverse to your orator; and your orator prays that said pretended patent from the United States to the Southern Pacific Railroad Company may be set aside, canceled and annulled, and that defendants be forever enjoined from chopping down or carrying away any wood, trees or timber upon said land.

And your orator further prays that an account may be taken by and under the direction and de-

cree of this Honorable Court for all moneys and profits realized by said defendants from wood, timber and trees taken from said land, and for all moneys and profits realized by defendant Southern Pacific Railroad Company from the pretended sale of said lands.

And your orator further prays that, if it shall be found that any of the defendants herein are bona fide purchasers for value of any of said lands within the meaning of said Act of Congress of March 3, 1887, then your orator prays that such defendants may be protected in their title to said lands by decree of this Honorable Court, and that your orator may have judgment against defendant railroad company for the sum of two dollars and fifty cents per acre for all such lands, if any, which this Honorable Court may find to be held by defendants herein as such bona fide purchasers for value.

And your orator prays for such other and further relief as the Court may deem equitable in the premises.

Your orator waives answer under oath.

JOSEPH H. CALL,

Special Asst. U. S. Attorney and Solicitor for Complainant.

W. H. H. MILLER,

Attorney General.

[Endorsed]: No. 184. In the U. S. Circuit Court, Southern Dist. of Cal. United States vs. Southern Pacific Railroad Company et al. Amended Bill. Received Copy of within Amended Bill for J. D. Redding, Solicitor for Defendants in Pursuance of Rule 49 of the Circuit Court. Wm. M. Van Dyke, Clerk. Filed September 25th, 1891. Wm. M. Van Dyke, Clerk. Joseph H. Call, Sol. for Compl.

In the Circuit Court of the U. S., Ninth Circuit, Southern Dist., Cal.

184.

UNITED STATES,

Complainant,

vs.

SOUTHERN P. R. R. CO. and Many Others,

Respondents.

Order of Substitution of Certain Party Respondent in Case No. 184.

In the above-entitled cause it appearing that one of the respondents, namely, The Atlantic and Pacific Fibre Importing and Manufacturing Co., Limited, has sold its lands involved in this cause to Jackson Alpheus Graves, and the deed of sale having been exhibited to this Court, and it appearing that said Graves is the proper party respondent instead of said company.

Now, therefore, on motion of Jos. D. Redding, solicitor for all of said respondents, it is ordered that Jackson Alpheus Graves be entered as one of the respondents in this cause in the place and stead of the Atlantic and Pacific Fibre Importing and Manufacturing Company (Limited), furthermore ordered that said respondent, Graves, by his solicitor, Jos. D. Redding, shall have thirty (30) days from the signing hereof in which to plead, demur or answer to the bill of complaint.

ROSS,
District Judge.

[Endorsed]: 184. Circuit Court U. S. of A., Complainant, vs. S. P. R. R. Co. et al., Respts. Order of Substitution of Certain Party Respondent. Filed Apr. 25, 1893. Wm. M. Van Dyke, Clerk. ————, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

No. 184.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

The Southern Pacific Railroad Company and D. O. Mills and Garrit L. Lansing, Trustees, The City Brick Company, Atlantic & Pacific Fibre Importing and Manufacturing Company, Limited, Julius Abrahamson, Hugo Abrahamson, Mrs. Jesus Ord de Andrade, Mrs. Thomas Allison, Mrs. Mary Backman, Mrs. Matilda L. Barber, Henry A. Barclay, E. T. Barber, Thomas N. Beck, A. M. Benham, Jesse Martin Blanchard, E. H. Blood, Ira H. Bradshaw, B. B. Briggs, Philomela T. Burrell, Frederick H. Busby, A. W. Butler, H. A. Bond, William H. Carlson, V. E. Carson, B. F. Carter, Harry Chandler, Fred Chandler, Walter S. Chaffee, J. N. Chapman, F. O. Christensen, Mrs. L. C. Chormicle, Byron O. Clark, George Claussen, Clarence T. Cleve, Nicholas Cochems, Nathan Cole, Jr., Peter Cook, I. D. Cory, Seaton T. Cull, Stefano Cuneo, J. A. Dahl, Andrew J. Darling, Thomas A. Delano, Richard Dillon,

John Ditter, David Dolbeen, John F. Duehren, James F. Dunsmoor, Edward G. Durant, Robert Dunn, Henry Elms, Fairmount Fruit Land Company, George W. Fentress, S. W. Ferguson, William Ferguson, William Freeman, Joseph W. Furnival, J. Garber, F. C. Garbutt, J. Drew Gay, F. A. Geier, Ambrose F. George, Will D. Gould, Mrs. Mary L. Gould, Thomas E. Gould, James Greton, W. F. Grossner, D. J. Haines, Herman Haines, James M. Hait, Simeon Hamberg, Jacob Harpe, Alice A. Hall, Calvin Hartwell, William T. Hamilton, James Hamilton, Peter Hamilton, John C. Haskell, John C. Hay, Mary Jackson Hall, Julius Heyman, J. M. Hill, John D. Hoffman, August Hoelling, J. F. Holbrook, W. R. Hughes, George A. Hunter, J. F. Houghton, E. J. Ismert, W. W. Jenkins, Thomas J. Johannsen, M. D. Johnson, John J. Jones, A. S. Joseph, John Kenealy, Frederick Kenworthy, Richard Kichline, Joseph Kurtz, Charles Kutschmar, Mrs. Ammoretta J. J. Lanterman, Thomas B. Lawhead, L. B. Lawson, M. Fetra, Stephen L. Leighton, John Robarts and G. L. Mesnager, Executors of the Last Will and Testament of Miguel Leonis, Deceased, George Loomis, Marion C. Loop, Pablo Lopez, Daniel Luce, G. W. Mack, John B. Martin, Cora L. Mathia-

son, Ezra May, Angus S. McDonald, A. M. Melrose, Mrs. Flossie Melrose, W. E. McVay, Thomas Menzies, J. G. Miller, John Million, Mrs. Mamie O. Million, H. H. Mize, Thomas F. Mitchell, W. H. Mosely, L. E. Mosher, Joseph Mullally, Andrew Myers, D. C. Newcomb, Albert E. Nettleton, North Pasadena Land and Water Company, James O'Reilly, George L. Ott, Pacific Coast Oil Company, J. H. Painter, M. D. Painter, Mrs. Annie Palen, J. R. Pallett, W. H. Pallett, T. A. Pallett, C. O. Parsons, F. W. Pattee, James Peirano, John J. Peckham, Ramon Perea, Daniel Phelan, Edward E. Perley, McH. Pierce, William Pisch, R. M. Pogson, A. W. Potts, Lafayette S. Porter, A. J. Praster, F. H. Prescott, Lewis H. Price, Charles Raggis, William B. Ralphs, James B. Randol, C. P. Randolph, Francisco Real, George H. Reed, John Rea, Otto Rinderknecht, Felipe Rivera, James Robertson, George D. Orwan, S. D. Savage, Jacob Scherer, George W. Seifert, Luciano Sequoia, Henry C. Shearman, Henrietta Shirpser, Rebecca Jetta Shirpser, David Shirpser, Max Shirpser, Gianbarista Sinaco, J. S. Slausson, J. Wallen Smith, Mrs. Maggie Smith, E. Sommer, W. A. Spencer, H. G. Stevenson, H. J.

Stevenson, M. W. Stimson, Robert Strathearn, R. P. Strathearn, Elneanor Sussman, D. M. Sutherland, John Sweeney, W. H. Taggart, James P. Taylor, Mary G. Tongier, James R. Townsend, Mrs. C. L. True, L. Tunison, J. S. Turner, George S. Umpleby, F. Veysett, George Vilas, Alden R. Vining, Daniel A. Wanger, S. A. Waldron, W. W. Wallace, C. H. Watts, Mrs. Julia J. Wheeler, A. C. Whitacre, M. L. Wicks, Moye Wicks, Mrs. Jennie Wicks, Mary C. Williams, C. N. Wilson, R. N. C. Wilson, J. Youngblood and J. A. Graves,

Defendants.

Answer to Amended Complaint in Case No. 184.

Now comes the respondents in the above-entitled cause and for answer to the amended bill in equity, filed herein on the 26th day of September, 1891, against them, purporting to be a bill brought by the United States, by the Attorney General thereof, and signed by Joseph H. Call, as Special Assistant U. S. Attorney, and counsel for complainant, and to so much and such parts of said bill as they are advised it is material for them to make answer unto answering, say:

I.

That said respondents aver that the Southern

Pacific Railroad Company, respondent herein, is a corporation, organized and existing under and by virtue of the laws of the State of California, as hereinafter stated, and a citizen of said last mentioned state.

And the respondents admit that the lands described in said bill were acquired by the United States of America from Mexico, in or about the year 1846, and the title to said lands was confirmed to the United States by the treaty of Guadalupe Hidalgo in the year 1848. The said respondents deny that such lands or any thereof ever since such acquisition or confirmation of title thereof have been, or at the time of, or at any time since, the filing of the bill of complaint in this suit, were or have been, or that they or any of them are now, owned by the United States, by title in fee simple or otherwise; they deny that the complainant during said times or at the time of or at any time since the filing of the bill of complaint in this suit was or has been, or that it now is, in possession of said lands or any of them, and allege on the contrary that the said lands described in the said bill, long before the filing of said bill were granted by the complainant to the respondent, the Southern Pacific Railroad Company, and thereafter were and have been, for the most part if not entirely, in its possession, or the possession of its grantees, so far

as any person or party was in actual possession thereof.

II.

The said respondents admit that by an Act of Congress approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast"; Congress incorporated the Atlantic and Pacific Railroad Company and granted to said Company to aid in the construction of a railroad and telegraph line in said Act described, a large quantity of public lands, but it avers that such grant was made on and subject to the conditions and the limitations in said Act mentioned, to which said Act of Congress reference is hereby made. U. S. Stats., Vol. XIV, p. 292. The said respondents admit that sections 3 and 18 of said Act of Congress are correctly set forth and recited in said bill; but by reason of the insufficiency of said recitals, this defendant refers to the whole of said Act of Congress.

The said respondents are uninformed as to whether the said Atlantic and Pacific Railroad Company only accepted said grant, and therefore controvert the allegation on that behalf, in the bill herein contained; they admit upon information and belief that the Atlantic and Pacific Railroad Company began to construct a railroad in the State of Missouri, but they

deny that it ever proceeded to or did construct any portion of any railroad in the State of California.

And the said respondents deny that said Atlantic and Pacific Railroad Company did locate on the ground or designate upon a plat or map the whole of said line of railroad, under or in accordance with said Act, from Springfield, Missouri, by way of the points or places named in said Act, or in the time or manner provided in said Act, or otherwise, to the Pacific Ocean, and deny that it ever lawfully located, or adopted or designated any part of said line in the State of California; and deny that on or about the —— day of ————, 1866, or at any other time, said company did file any such plat in the office of the Commissioner of the General Land Office, and deny that at that or any such time, any such designation or location of said line of railroad was approved by the Secretary of the Interior, and deny that the odd sections of public lands on each side of said road for thirty miles were withdrawn from market or reserved, and deny that the lands in suit herein or any of them fell within the twenty mile limits of any such line or were ever lawfully withdrawn from market or reserved for or for the benefit of said Atlantic and Pacific Railroad Company; and deny that the Atlantic and Pacific Railroad Company ever designated a line of railroad between the Colorado River and the Pacific Ocean by a map thereof filed in the

office of the Commissioner of the General Land Office, or made or filed a map of definite location of a route from the Colorado River to the Pacific Ocean, whether by the most practicable and eligible route **or** otherwise howsoever.

The said respondents aver that the said Atlantic and Pacific Railroad Company never made any actual or definite location of its railroad in California nor constructed any part of a railroad in said state, under or according to the Act of Congress approved July 27th, 1866, or any amendments, modifications or supplements thereto, or otherwise howsoever.

The pretended location of a route by said Atlantic and Pacific Railroad Company in California never was or became an actual or a definite location, or anything else than an attempted or pretended designation of a general route for a railroad from —— Francisco to the Needles, and such pretended location or designation of route was a colorable and fraudulent location or designation of an unauthorized and impracticable line. The Secretary of the Interior never undertook to accept such pretended location or designation as anything else than a designation of a general route, and no right to or interest in any public lands was or could be acquired by said railroad company by reason of any such attempted location or designation or any act of acceptance thereof; and the decision of a Secretary of the Interior holding

that such a general route was authorized by the Act of Congress, approved July 27, 1866, was in contravention of a previous decision of a prior Secretary of the Interior to the contrary effect, and subsequently thereto and prior to the institution of this suit was reversed by the decision of a subsequent Secretary of the Interior, holding that the said Atlantic and Pacific Railroad Company was not entitled to construct or locate a line to San Francisco, which last mentioned decision still remains in full force and effect, so far as the Interior Department is concerned; and as these defendants are advised and believe, and therefore aver, the decision of a Secretary of the Interior undertaking to accept from the Atlantic and Pacific Railroad Company a designation of a route for a railroad upon the route referred to, was unauthorized and void, and in violation of the rights acquired by and vested in the Southern Pacific Railroad Company.

These respondents ask leave to refer to said decisions, and to file copies thereof herein, if deemed necessary.

Respondents admit and aver that the greater part, but not all the lands in suit herein are situated within twenty miles of the pretended line of general route of said Atlantic and Pacific Railroad from San Francisco to the Needles, and the greater part, but not all thereof are situated within twenty miles of the South-

ern Pacific Railroad and that all thereof are within thirty miles of said Southern Pacific Railroad.

The said respondents deny that the said Atlantic and Pacific Railroad Company was authorized by said Act or any other Act of Congress to locate or construct a line of railroad from the crossing of the Colorado River to San Francisco; they are advised and believe and therefore aver that under said Act of Congress, the respondent, the Southern Pacific Railroad Company, alone was authorized to construct a line of railroad from the crossing of the Colorado River to San Francisco, and to acquire lands under said Act of Congress, along and opposite said line, and that the only right which the Atlantic and Pacific Railroad Company ever acquired to construct any line of railroad in the State of California was the right to construct a road from the crossing of the Colorado River by the most practicable and eligible route to the Pacific Ocean, which route was not on the line pretended to be designated by the said Atlantic and Pacific Railroad Company, but to the southerly thereof, and through the San Gorgonio Pass to the Pacific in the vicinity of San Pedro.

III.

The said respondents admit that by section 23 of an Act of Congress, approved March 3, 1871 (U. S. Stats., Vol. 16, p. 573), entitled "An Act to incor-

porate the Texas and Pacific Railroad Company and to aid in the construction of its road and for other purposes," it was provided as follows:

"Sec. 23. That, for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the Act of July twenty-seven, eighteen hundred and sixty-six; provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

IV.

The said respondents admit that by the Act of Congress, approved July 6, 1866, entitled "An Act to forfeit the lands granted to the Atlantic and Pacific Railroad Company, to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to restore the same to settlement and for other purposes," all the lands and rights to lands in California

theretofore granted or conferred upon said Atlantic and Pacific Railroad Company were declared forfeited and restored to the public domain. They pray leave to refer to said Act, but they deny that the same in any wise operated to forfeit or resume or restore to the public domain any lands as against these respondents. They admit and aver that no part of said Atlantic and Pacific Railroad had at the time of the passage of said Act of 1886, or has at any time since, been constructed in the State of California.

V.

The said respondents admit that they claim ownership in themselves and their grantees of the lands described in the bill of complaint and they admit that they claim the same, and aver that they acquired and became entitled to said lands, under and by virtue of the said Act of Congress of March 3, A. D. 1871, and the grant to the Southern Pacific Railroad Company therein contained, and they admit that they claim, and they aver the fact to be, that the said Southern Pacific Railroad Company duly accepted the said grant and the terms and conditions thereof and duly designated and located the route and line of its road between the points in that behalf mentioned in said Act and within the time and manner in said Act provided on that behalf, such designation and location being made by plat or map thereof,

which it filed in the office of the Commissioner of the General Land Office on the 3d day of April, 1871, and they pray leave to refer to said map or plat when the same shall be produced in this suit. They aver that such map or plat was duly accepted by the Secretary of the Interior as designating the line of its road between the points mentioned in said Act and in accordance with said Act of Congress and for twenty years and over the Interior Department held and conclusively adjudged that the grant to said Southern Pacific Railroad Company under said Act became effective and attached to the lands granted thereby and involved in this suit, on the 3d day of April, 1871, and during all that period the transactions between the complainant and the said Southern Pacific Railroad Company were based upon that claim by the railroad company and its acceptance and adoption by the complainant; and the transactions between said railroad company and the other defendants in respect to lands involved in this suit, were and have been based upon such action, determination and rulings of the Interior Department of the United States, and they aver that afterward maps and plats were filed in the office of the Commissioner of the General Land Office of its line of railroad as built from a point at or near Tehachapi Pass by way of Los Angeles to the Colorado River under and in pursuance of the provisions of said Act of

March 3, 1871, such last mentioned maps and plats having been so filed on the following dates, viz.:

Section 1, May 7, 1874.

Section 2, November 13, 1875.

Section 3, July 19, 1876.

Section 4, February 28, 1877.

Section 5, December 28, 1877.

They deny that the located or designated line of route of the said Southern Pacific Railroad Company, as aforesaid, lies upon the same line as the attempted or pretended line of route, or as any lawfully designated or located line of route, of the Atlantic and Pacific Railroad Company, and deny that the lands in suit herein would be or are at any place where the designated and located line of the Southern Pacific Railroad Company aforesaid, and any lawfully designated or located line of the Atlantic and Pacific Railroad Company would be or are upon the same general line or would have intersected or intersect each other. They deny that if the Southern Pacific Railroad Company had, as it did designated its line of route from Tehachapi Pass by way of Los Angeles to a point at or near the Colorado River as claimed by these respondents or between such terminal points at all, that such route would have been upon the same general line as the pretended route of the Atlantic and Pacific Railroad Company as alleged in said bill to have been located

by it or any line or route which could have been lawfully designated or located by said Atlantic and Pacific Railroad Company under the Act of Congress of July 27, 1866, above referred to or otherwise.

They deny that any line or route of the Atlantic and Pacific Railroad Company has ever been lawfully located or designated in the State of California or any limits of the grant for such company ever lawfully fixed or in any wise defined or ascertained and deny that the lands in suit fell or fall within any limits of any grant to the Atlantic and Pacific Railroad Company. They deny the allegation in said bill contained that none of said lands were covered by the grant to the Southern Pacific Railroad Company and that none of said lands were of the category of lands which were to be granted to said company, and each of them, and aver the contrary thereof.

And these respondents further show that upon the filing by said Southern Pacific Railroad Company of the map or plat of its line on said 3d day of April, 1871, as hereinbefore stated, the Secretary of the Interior, under date of April 3, 1871, directed the Commissioner of the General Land Office to withdraw the granted lands along the route of said railroad as designated on said map from pre-emption, private entry and sale, and the Commissioner of the General Land Office under date of April 21st,

1871, issued instructions to the registers and receivers of the proper United States District Land Offices in California to withdraw from sale or location, pre-emption or homestead entry all the odd-numbered sections of public lands within thirty miles of the said line of said railroad, and these respondents aver that all the lands mentioned in the bill of complaint in this suit which were public lands at the date of such orders for withdrawal, were thereupon withdrawn according to the said instructions. Certified copies of said orders of withdrawal are hereto annexed and made part of this answer, marked Exhibit "A," a certified copy of the official diagram defining and marking the twenty and thirty mile limits opposite said railroad is herewith filed and made part of this answer marked Exhibit ——.

These respondents aver that the line of route of the Southern Pacific Railroad through said lands had been duly located, and the lands granted to it by said 23d section of the said act of March 3, 1871, had been duly withdrawn from market for the benefit of the respondent, the Southern Pacific Railroad Company, before the said Atlantic and Pacific Railroad Company attempted or pretended to designate or locate its general route or line for its road through or opposite to the said lands, or any part of such general route.

And these respondents aver that the respondent herein, the Southern Pacific Railroad Company, under and in fulfillment of the provisions of the said Acts of Congress hereinbefore cited, duly located, constructed and completed its said railroad from a point near Tehachapi Pass, by way of Los Angeles, to the Colorado River, and commissioners appointed by the President of the United States duly reported the fact of such completion, and said railroad was from time to time duly approved and accepted by the President of the United States, and maps thereof duly filed in the General Land Office as above stated.

And these respondents ask leave to refer to and exhibit herein, certified transcripts from the Department of the Interior at Washington to show such maps and the action of said Commissioners and of the President of the United States and the Interior Department in this matter.

VI.

These respondents allege that the line of route for the said Railroad from Tehachapi Pass, by way of Los Angeles, to a point at or near the Colorado River and for all the route between the terminal points named in said Act of Congress, has been located and constructed by the Southern Pacific Railroad Company in accordance with the said Act of Congress, and they deny that said line of route is

upon the same general line as the pretended route of the Atlantic and Pacific Railroad in California, and the said respondents claim and aver that the lands described in the said bill of complaint were and are of the category of lands granted to the said Southern Pacific Railroad Company and were, and are, sections and parts of sections of odd numbers, and within the limits of said grant.

VII.

These respondents admit that the greater part but not all of the lands in suit herein are situated within twenty miles of the pretended general or preliminary route of the said Atlantic and Pacific Railroad from San Francisco to the Needles, but they deny that they are situated within twenty miles or any other distance, of any lawfully designated or located route or line of route of said railroad company or within any lawful limits of any grant to said Company. They admit that as to the actual mineral character of said lands they were in the same condition in respect to minerals in the whole of the year A. D. 1866, that they were and have been all the time from that year down to and including the 3d day of April, 1871, but they are uninformed as to whether there were changes during such period in the knowledge or understanding, or general knowledge or understanding as to the mineral character thereof.

VIII.

Replying to paragraph eight of the Bill of Complaint these respondents deny the allegations of said paragraph and each of such allegations and aver that their claim to the lands in suit herein is legal and valid and founded upon express grant thereof to the said Southern Pacific Railroad Company for and upon a full and executed consideration from the complainant and as to some of said lands they ask leave to refer to and show a patent or patents thereof to said Southern Pacific Railroad Company from the Government of the United States legally issued and duly authenticated.

And these defendants further say, that so far as the right of way of the Southern Pacific Railroad Company one hundred feet in width on each side of its railroad from a point at or near Tehachapi Pass by way of Los Angeles to the Colorado River and its grounds for station buildings, workshops, depots, machine-shops, switches, sidetracks, turntables and water stations are concerned, it claims and is entitled to the same under and by virtue of the provisions of section 23 of the Act of March 3, 1871, hereinabove referred to, which conferred upon the Southern Pacific Railroad Company of California all the rights, grants and privileges granted to said Southern Pacific Railroad Company of California, by the Act of July 27th, 1866, including those specifically

mentioned and referred to in section 2 of said last-mentioned act; and it avers that at the time the pretended line of the Atlantic and Pacific Railroad Company from San Francisco to the Needles is pretended to have been designated by a plat thereof filed in the office of the Commissioner of the General Land Office, the United States did not have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights, to the said right of way one hundred feet in width on each side of said railroad of said Southern Pacific Railroad Company, or such ground for station buildings, workshops, depots, machine-shops, switches, sidetracks, turntables and water stations, but such right of way and lands had been reserved, granted and appropriated to and for the Southern Pacific Railroad Company and were subject to its claims and rights for the purposes above stated, and no right or claim of the Atlantic and Pacific Railroad Company present or prospective thereto or in respect thereof ever did attach or could have attached thereto or to any part thereof.

IX.

These respondents admit that they claim, and they aver the fact to be, that a line of railroad and telegraph from Tehachapi Pass by way of Los Angeles to the Colorado River has been constructed by the Southern Pacific Railroad Company within

the time, and in the manner provided by said Act of Congress of March 3, 1871, herein referred to, and that Commissioners appointed by the President of the United States have reported that such railroad was constructed in all respects in compliance with said act, and these respondents ask leave to refer to the reports of the Commissioners now on file in the Department of the Interior in Washington City, and to produce and file herein certified copies of said reports. They deny that any such claims are pretenses, or are unfounded and aver that the Southern Pacific Railroad Company named in said Act of Congress of March 3, 1871, did construct the said railroad and telegraph line between said terminal points within the time and in the manner provided by said Act of Congress and deny the averments to the contrary thereof in said bill contained.

X.

These respondents admit that on or about the 2d day of December, 1865, a corporation was organized under the laws of the State of California under the corporate name and style of the Southern Pacific Railroad Company, and under a general law of said State, approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof and other matters relating thereto." It admits that

said act is printed in the Statutes of California, 1861, at page 607 and prays to refer thereto.

XI.

These respondents admit that the said corporation, "The Southern Pacific Railroad Company" was formed for the purpose and with the corporate powers, as stated in the Articles of Incorporation, of constructing, owning and maintaining a railroad from some point on the Bay of San Francisco, in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the town of San Diego in said State; thence eastward through said county of San Diego to the eastern line of the State of California there to connect with a contemplated railroad to the Mississippi River; and they refer to said Articles of Incorporation for the precise contents, purport and effect thereof.

XII.

These respondents aver that on or about the 11th day of October, A. D. 1870, under and by virtue of the general laws of the State of California on that behalf, the said Southern Pacific Railroad Company, the San Francisco and San Jose Railroad Company, the Santa Clara and the Pajaro Valley Railroad Company, corporations organized and existing under the laws of California, entered into real, but

they deny that they entered into pretended articles of consolidation and amalgamation, consolidating and amalgamating their capital stocks, debts, property, assets and franchises under the name of the Southern Pacific Railroad Company, in the manner provided by the laws of California. They admit and aver that such articles were signed, published and filed as provided by the laws of California.

They pray leave to refer to such articles of consolidation and amalgamation, if material to any purposes of this suit, and to the laws of California authorizing the same, and to the laws of California affecting the corporations aforesaid or any of them and to the amendatory articles of the Southern Pacific Railroad Company filed ———. They deny that by any such articles of agreement of consolidation and amalgamation, or by any consolidation or amalgamation a different capital was made, any substantially new stock issued, or a new or different corporation created, but on the contrary, they aver that the corporation thereafter existing was a consolidation and amalgamation of the theretofore existing corporations and not a newly created corporation. They pray leave to refer to the Articles of Incorporation of the consolidating companies if in any wise material to this suit. They allege that said consolidation and amalgamation of said corporation were authorized by the laws of California and by the laws

of the United States so far as applicable, and were, and are, legal and valid, and deny all allegations in said bill to the contrary thereof; they deny that such consolidation and amalgamation was unauthorized by the laws of the State of California or without the consent of said State, or was unauthorized by the laws of the United States, or without authority from the United States, or was, or is illegal or void.

XIII.

These respondents aver that on or about the 12th day of August, 1873, under and by virtue of the laws of the State of California on that behalf, the said Southern Pacific Railroad Company as it existed after the said consolidation and amalgamation of 1870, and composed of the consolidated and amalgamated companies above referred to and the Southern Pacific Branch Railroad Company, a corporation, organized and then existing under the laws of California, formed for the purpose and with the corporate powers stated in its articles of incorporation of constructing, owning and maintaining a railroad within the State of California, did consolidate and amalgamate their capital stock, debts, property, assets and franchises under the name and style of the Southern Pacific Railroad Company and entered into articles of consolidation and amalgamation of which Exhibit "A" attached to the plaintiff's bill is a copy, and that said articles were duly signed,

published and filed as required by the laws of California. They pray leave to refer to such articles so far as material to this suit, and to the laws of California authorizing the same. They aver that such consolidation and amalgamation and such articles of consolidation and amalgamation were real and not pretended and deny that by such articles of agreement of consolidation and amalgamation, or by any consolidation and amalgamation, a new capital stock or a new or different corporation was created, or purported to be created, but they aver that the corporation thereafter existing was a consolidation and amalgamation of the theretofore existing corporations and not a newly created corporation.

As to the contents, purport and effect of the articles of incorporation of the consolidating companies they pray leave to refer to the same if in any wise material to this suit; and they pray leave to refer to the laws of the State of California as existing in and prior to 1873, authorizing the consolidation and amalgamation of railroad companies incorporated under the laws of that State.

These respondents deny that such articles of consolidation and amalgamation were illegal or void or unauthorized or prohibited by the laws of the State of California, or were unauthorized or prohibited by the laws of the United States or were entered

into without authority from the Congress of the United States, or without other competent authority, but on the contrary they aver that the consolidation and amalgamation of said railroad companies was made in conformity with the laws of the State of California whose action in that behalf was fully authorized and recognized by the Congress of the United States, and that such consolidation and amalgamation was and is in all respects valid.

These respondents deny that by entering into said articles of consolidation and amalgamation the said Southern Pacific Railroad Company named in the Act of Congress, of March 3, 1871, forfeited, abandoned or released to the United States all or any part of the lands granted to it by said Act of Congress or all or any rights, grants, franchises or privileges conferred by said act, or all or any right to earn or acquire any and all lands under said act.

XIV.

These respondents admit that the Southern Pacific Railroad Company which is defendant herein claims to have, and they aver that it has patents issued by the United States to it in due form of law, purporting to convey and conveying to said company a portion of the lands in suit herein. It avers that said patents were real and not pretended and were duly recorded in the General Land Office before they were delivered to said company, and still re-

mained so of record, and since the delivery thereof, the same have been recorded in the county of Los Angeles, and ——— in the State of California.

These respondents deny that the lands thus patented are unknown to the complainant, and deny that the patents therefor were issued illegally or without authority of law or are illegal or void. On the contrary, these respondents allege that said patents are in all respects legal and valid, and they ask leave here to refer to the same and to present and file as evidence in this suit, duly certified copies thereof, if deemed necessary.

XV.

Replying to paragraph XV of the complainant's bill these respondents admit that the defendants and respondents other than the Southern Pacific Railroad Company claim to be and they and each of them aver that they are in each and every instance, bona fide purchasers for value received, without notice, from the Southern Pacific Railroad Company, a corporation named in said Act of Congress of March 3, 1871, and they further aver that the time of the purchase in each instance by said respondents and defendants and each of them from the said Southern Pacific Railroad Company is set forth in Exhibit "B" hereto attached and made part of this answer and also copies of the deeds and parties to

the deeds and contracts of sale and the contents thereof are hereto attached and marked Exhibits "G" and "H" and made a part of this answer. That in said Exhibit "B" is also given the date and day of each purchase made by said defendants and respondents and each of them. That at the time the respondents, other than the Southern Pacific Railroad Company purchased said lands as are set forth in said Exhibit "B" said Southern Pacific Railroad Company the vendor, at that time, was the owner and seized in fee of said lands and said respondents entered into the possession of the said lands all of which are involved in this suit under said purchase and the consideration in each instance paid by the said respondents to the said Southern Pacific Railroad Company, which appears in each instance opposite the name of each respondent in said Exhibit "B," was a bona fide one and was paid truly and in a bona fide manner and without notice at the time of said payment or at any time prior thereto in each instance. And said respondents other than the Southern Pacific Railroad Company aver that they have no knowledge as to which, if any, of the corespondents and codefendants herein claim any right in the lands in suit, or any part or parcel thereof, under or by virtue of an Act of Congress approved March 3, 1887 (24 Stat. 556), referred to in the bill of complaint.

XVI.

These respondents admit that the respondents D. O. Mills and Garrit L. Lansing, have a mortgage or deed of trust from the Southern Pacific Railroad Company for the above-described lands to secure the payment of certain indebtedness of said defendant railroad company, and that said mortgage is dated April 1, 1875, and is executed in due form of law, and is recorded in Los Angeles and San Bernardino and Ventura Counties, California, where the same has been of record since 1875, but they deny that complainant has any title to said lands or any part thereof which can be clouded or injuriously or otherwise affected thereby.

XVII.

They admit that the lands described in said bill are to a considerable extent naturally timbered or wooded lands and valuable for the timber and wood thereon. While admitting that they claim but denying that they pretend to own an interest in said lands these defendants deny that they or their grantees have ever unlawfully entered on said lands or unlawfully chopped down any timber or trees thereon and deny that said lands, timber or trees or any thereof were at any time since the taking effect of the grant to the defendant, the Southern Pacific Railroad Company above referred to, the property of the complainant in this suit. They admit and aver that the South-

ern Pacific Railroad Company and its grantees have at various and divers times carried away timber and trees from said lands and applied the same to their own use and are now removing from said land wood cut thereon and are intending to and unless enjoined therefrom will chop down other trees on said land, but they deny that any such acts were, are or will be in any wise unlawful or have resulted or will or could result in any injury to the complainant.

XVIII.

They admit that the amount in controversy in this suit exceeds the sum or value of five thousand dollars exclusive of interest and costs.

XIX.

They admit and aver that the defendant, the Southern Pacific Railroad Company, while claiming (but not pretending) to own an interest in said lands, has at various and divers times during the past ten years by actual (but not pretended) contracts and conveyances sold and conveyed (but not pretended to sell or convey) large portions of said lands to other of the defendants herein, and by itself and its grantees has realized from wood and timber on said lands considerable sums of money which it and they have appropriated to its and their own use.

XX.

The respondent, the Southern Pacific Railroad

Company further answering states that the schedule hereto annexed, marked Exhibit "B," and made part of this answer, is a correct schedule of all such lands claimed in this suit as the said respondent has sold prior to the filing of the bill of complaint herein, together with the names of the parties who were the purchasers, and the amounts of money received by the said respondent, upon the contract of sale to each purchaser respectively, and it avers that at the time of such sales and each of them the said defendant rairoad company was the owner of the lands so sold, and that it is now the owner of all of such lands which have not been so sold by it.

XXI.

And all of the respondents herein, other than the Southern Pacific Railroad Company, D. O. Mills and Garrit L. Lansing, admit and allege that they and each of them claim to be bona fide purchasers for value, from the said Southern Pacific Railroad Company and its grantes, also purchasers in good faith, but not otherwise, of all of the lands hereinbefore specifically described and set forth in Schedule "B" as having been sold by the respondent the Southern Pacific Railroad Company, and that they purchased the same in good faith and for a valuable consideration believing and still believing that at the time of their said purchase of said lands they were owned by

absolute title in fee simple by said Southern Pacific Railroad Company and its said grantees.

That attached hereto and made a part of this answer are several exhibits which respondents ask may be taken as a part of the answer and referring thereto and to each and every allegation to which said exhibits are pertinent, namely:

Exhibit "A," being certified copy of a letter from Willis Drummond, Commissioner of the General Land Office, dated April 21, 1871, to the Register and Receiver, Los Angeles, California, order of withdrawal of lands within the limits of the Southern Pacific Railroad Company's Branch Line.

Exhibit "B,,' referred to on page 22 of the answer, being a statement, under date of July 3, 1890, of the condition on the books of the Land Department of the Southern Pacific Railroad Company of lands involved in said suit, tabulated under the following headings: "Contract No. Contract dated. Purchaser. Address. Fraction. Sec. Twp. Rge. Acres. Amount sold for. Surveyed or unsurveyed. A & P. R. R. Co. Limits. S. P. R. R. Limits. Main, Branch Line. Selected or not selected by S. P. R. R. Co. No. and date of selection list. Costs of surveying, selecting and conveying, which is divided into three columns as follows: Surveying fees, selected Reg. and Rec. fees, costs of conveying. Remarks."

Exhibit "C," certified copy of List No. 21 of lands

selected by the Southern Pacific Railroad Company within the granted limits of the grant made by the 23d section of the Act of Congress approved March 3, 1871, on account of the line known as the branch line of said Southern Pacific Railroad Company, which lands are situate in the Los Angeles, California Land District.

Exhibit "D," certified copy of list numbered 25 of lands selected by the Southern Pacific Railroad Company within the indemnity limits grant made by the 23d section of the Act of Congress approved March 3, 1871, on account of the line known as the branch line of said Southern Pacific Railroad Company, which lands are situate in the Los Angeles, California Land District; together with the designation of losses stated as a basis for such selections; also supplemental list of losses.

Exhibit "C-2," certified copy of a letter to the Commissioner of the General Land Office, January 19th, 1889, by Henry Beard, Attorney for the Southern Pacific Railroad Company of California; also copy of certificate of deposit No. 1431 of the National Bank of the Republic, Washington, D. C., dated January 19th, 1889, by said Railroad Company of $12.50 on account of conveying the lands located at the Los Angeles, California Land Office, at Los Angeles, California, List No. 21.

XXII.

Further answering the respondents deny that when the grant was made to the Southern Pacific Railroad Company by the Act of Congress of March 3, 1871, it was found that the line of route which said Company was required to adopt and did adopt; was upon the same general line as the route of the Atlantic and Pacific Railroad Company from Springfield, Missouri, to the Pacific.

Respondents deny that there ever was any general line of route of road adopted or designated by the Atlantic and Pacific Railroad Company in the State of California or from the Colorado River to the Pacific Ocean.

Respondents deny that the route of the said Atlantic and Pacific Railroad Company from Springfield, Missouri, to the Pacific Ocean as said grant was made to the said Company by the said Act of Congress of July 27, 1866, or by any Act of Congress, or as said route may have been in any wise located or adopted by said Company (if it ever was so located or adopted) was, or is, upon the same general line as the route of the said Southern Pacific Railroad Company from Tehachapi Pass by the way of Los Angeles to the Colorado River at Fort Yuma, according to the terms of said grant to the said Southern Pacific Railroad Company, of March 3, 1871, or as said route was in fact adopted or located or at all; re-

spondents further deny that the lands in suit herein were at the intersection of any such two lines of route or at the place where any such two routes were or are upon the same general lines and the respondents deny that the said lands or any lands mentioned herein were excluded or deducted from the grant to the said Southern Pacific Railroad Company, under said Act of March 3, 1871.

XXIII.

And these defendants further answering, say that the Southern Pacific Railroad Company, to which the grant of lands was made by the Act of Congress of March 3, 1871, still exists under the laws of the State of California under which the same was created, and has at no time caused to exist or surrendered or lost the rights conferred by said act and is the same corporation which is made party defendant to this bill, and that any and all amalgamations or consolidations therewith of other railroad corporations organized under the laws of the State of California have been made in pursuance of and subject to the terms and provisions of the laws of the State of California, and by due and legal authority, and that the United States by constant and continued action of all branches of the Government has recognized the continued existence of the Southern Pacific Railroad Company as the grantee of lands under the Act aforesaid, and has always claimed and exercised, and

still claims and exercises, against the Southern Pacific Railroad Company, notwithstanding the amalgamations from time to time of various other railroad corporations of the State of California with the Southern Pacific Company originally constituted under the laws of said State, all the rights conferred upon the United States, and has demanded and enjoyed the benefit, and still demands and enjoys the benefit, of the performance of all the duties imposed upon the Southern Pacific Railroad Company under or by virtue of the said Act of Congress and each thereof and has claimed and exercised and still claims and exercises the rights and had demanded and enjoyed the benefit of and still demands and enjoys the benefit of the performance of the duties prescribed in said Act of Congress in respect of the line constructed by the Southern Pacific Railroad Company from a point at or near Tehachapi Pass by way of Los Angeles to the Colorado River, and is estopped in law and equity from asserting any claim that the Southern Pacific Railroad Company as now existing was not the same corporation named and designated in said Act or that the said railroad was not constructed by the grantee named therein, and that it could not in any event be adjudged in favor of the United States in this suit or otherwise that the said railroad was not constructed by the grantee named in said Act or that the Southern Pacific Railroad

Company as now existing is not entitled to the benefits of the grants named therein without the surrender and abandonment by the United States of its claim to the exercise by it of the rights and privileges heretofore claimed and exercised by it, and to the enjoyment by it of the benefit of the performance of the public duties heretofore claimed and enjoyed by it in respect of the Southern Pacific Railroad Company as from time to time existing and in respect of the said road under and by virtue of the Act of Congress above referred to.

XXIV.

And these defendants further answering say, that the United States cannot now restore these defendants to the same position in respect to the land grant to the Southern Pacific Railroad Company under said Act of March 3, 1871, and its rights and claims to indemnity for lost lands which it would have had if the United States had not accepted its selections of lands in controversy in this suit and issued patents to the said defendant for such of said lands as have been patented to it, inasmuch as since the date of said patents the United States has permitted other parties to acquire claims to and has granted other parties patents for valuable lands within the indemnity limits of its road under said Act of March 3, 1871, which would prevent this Company from making now as favorable indemnity selections as it might then

have made, and because the acceptance of such selections and issue of such patents has delayed the exercise by said Company of the right of selection of indemnity lands which this Company would have been entitled to, and has deprived it of the use and benefit of the lands which might have been derived thereunder at times when sales thereof might have been made upon terms to the defendant far more favorable than any upon which like lands could now be sold.

XXV.

And these defendants further answering say, that heretofore and on or about the first day of April, 1875, the Southern Pacific Railroad Company executed to the defendant D. O. Mills and one Lloyd Tevis a mortgage bearing date on that day to secure a proposed issue of negotiable mortgage bonds of said Southern Pacific Railroad Company therein referred to, a copy of which mortgage is filed herewith and marked Exhibit "E," and prayed to be taken as a part of this answer. That negotiable mortgage bonds to very large amounts were from time to time between said 1st day of April, 1875, and September 25, 1891, duly issued thereunder and sold to and purchased by the public in good faith and for full and valuable consideration, and that of such bonds there are now outstanding in the hands of bona fide holders thereof for value bonds to the amount at their par value of upwards of thirty-one million dollars.

That Garrit L. Lansing named as defendant in this suit has been duly substituted as mortgage trustee thereunder in place and stead of said Lloyd Tevis named as a trustee in said original mortgage.

XXVI.

And these defendants further answering say, that heretofore and on or about the 25th day of August, 1888, and before the institution of this suit the said Southern Pacific Railroad Company executed to the Central Trust Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the City and County of New York, a further mortgage or deed of trust bearing date on said 25th day of August, 1888, to secure a proposed issue of negotiable mortgage bonds of said Southern Pacific Railroad Company therein referred to, a copy of which mortgage is filed herewith and marked Exhibit "F," and prayed to be taken as a part of this answer. That negotiable Mortgage Bonds to large amounts were from time to time subsequent to said 25th day of August, 1888, and prior to the commencement of this suit duly issued thereunder and sold to and purchased by the public in good faith, and for full and valuable consideration, and that of such bonds so issued prior to the institution of this suit bonds to the about of six million, nine hundred and eighty-one

thousand dollars are not oustanding in the hands of bona fide holders thereof for value, and that the said Central Trust Company of New York is a necessary party to this suit; and these defendants pray the like effect for the foregoing allegations as if the non-joinder of such Central Trust Company of New York as a party to this suit were specially pleaded herein.

XXVII.

And these defendants further answering say, that being required so to do by the United States, said Southern Pacific Railroad Company has from time to time paid the following fees and charges to the United States upon and in respect of the lands in controversy in this suit, that is to say:

The sum of six thousand one hundred and thirty-five and 34-100ths ($6,135.64) dollars as and for surveying and registers and receivers and surveying fees required by the United States in respect of said lands, and that the United States could not in any event or under any circumstances be entitled to recover, maintain or assert any claim to the said lands or cancel or have cancelled the patents heretofore issued to said company in respect thereof until it should have repaid to said railroad company the amounts above mentioned with interest and in all other respects restored the company to the like position in all respects which it occupied at the time when such selections of said lands by the company were accepted

and approved and at the time when the patent therefor was issued to it as aforesaid by the United States.

XXVIII.

The respondents deny all and all manner of unlawful combination and confederacy with which they are by the said bill charged, without this, that any other matter, cause or thing in the complainant's said bill of complaint, contained material or necessary for these respondents to make answer unto, but not herein and hereby well and specifically answered, confessed, traversel, avoided or denied, is true to the knowledge or belief of these respondents, all of which matters and things these respondents are ready and willing to aver, maintain, and prove, as this Honorable Court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOSEPH D. REDDING,
Solicitor and of Counsel for Respondents.
HARVEY S. BROWN, R.,
Of Counsel for Respondents.

[Endorsed]: No. 184. Circuit Court of the United States, Ninth Circuit, Southern District of California. United States of America, Complainants, vs. S. P. R. R. Co. and others, Respondents. Amended Answer. Rec'd copy hereof (except ex-

hibits) May 31, --9—. Joseph H. Call, Spl. Asst. U. S. Atty. Received May 31st, 1893. Wm. M. Van Dyke, Clerk. Filed Ju. 12, 1893. Wm. M. Van Dyke, Clerk. Joseph D. Redding, Solicitor for Respondents, 33-37 Chronicle Building, San Francisco, Cal.

In the United States Circuit Court, Southern District of California, Ninth Circuit.

No. 184.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and Others,

Defendants.

Replication in Case No. 184.

Replication of the United States to the Answer of Southern Pacific Railroad Company and Others, Defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insuf-

ficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this Honorable Court shall direct, and humbly prays, as in and by this said bill he hath already prayed.

JOSEPH H. CALL,

Special Asst. U. S. Atty. and Counsel for Complainant.

[Endorsed]: No. 184. In the U. S. Circuit Court, Southern Dist. of Cal. United States of America, Complainant, vs. Southern Pacific Railroad Co. et al., Defendants. Rep. Filed August 2d, 1892. Wm. M. Van Dyke, Clerk. Joseph H. Call, Special Asst. U. S. Atty.

Defendants' Exhibit No. 44 in Case No. 184.

DEED No. 4719.

To All to Whom these Presents Shall Come:

The Southern Pacific Railroad Company, a corporation duly incorporated and organized under the laws of the State of California, and D. O. Mills and Garrit L. Lansing, trustees of all the lands of the said Southern Pacific Railroad Company, lying in the State of California, which remained unsold on the first day of April, A. D. 1875, send greeting:

Whereas, on the first day of April, A. D. 1875, the said Southern Pacific Railroad Company conveyed all its lands lying in the State of California, then unsold, of which the lands hereinafter described were and are a part, to D. O. Mills and Lloyd Tevis, to hold in trust, as security for the payment of forty-eight thousand bonds, forty-four thousand thereof for the sum of one thousand dollars each, and four thousand thereof for the sum of five hundred dollars each, issued and to be issued by said Southern Pacific Railroad Company in seven series, to be designated by the letters of the alphabet, commencing with the letter A, and followed by the succeeding letters in regular order to and including the letter G; series A to consist of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive; Series B to F, both inclusive, to consist of five thousand bonds each, for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive; series G to consist of six thousand bonds for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive; all of said bonds payable thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually;

said series A to bear date April first, eighteen hundred and seventy-five and the said several succeeding series to bear such dates respectively as the Board of Directors of said Southern Pacific Company may direct; all of said bonds aggregating the sum of forty-six millions of dollars.

And whereas, said deed of trust, among other matters, provided that the said Southern Pacific Railroad Company should have the sole and exclusive control and management of said lands, with full power to make sales of the same upon such terms and conditions as might, from time to time, be agreed upon between the said railroad company and the trustees; and that when such sales had been made the purchase money fully paid, the said company and the said trustees should unite in a conveyance in fee simple of the lands so sold to the purchaser or purchasers thereof, which conveyance should absolutely and forever release the lands so conveyed from any and all lien or incumbrance for or on account of said bonds, or any other debt or obligation of the said railroad company.

And whereas, on the 24th day of March, 1883, Lloyd Tevis, one of the trustees, did resign his trust under said conveyance on the first of April, 1875; and whereas, on the 3d day of April, 1883, the said D. O. Mills, the remaining trustee under said conveyance, did, pursuant to the terms of his trust, nominate Ger-

rit L. Lansing of the city of San Francisco, and State of California, to fill the vacancy caused by the resignation of said Lloyd Tevis;

And whereas, on the 17th day of April, 1883, the Board of Directors of the said Southern Pacific Railroad Company, pursuant to the terms of said trust, did ratify and approve said nomination, and did appoint said Gerrit L. Lansing to fill said vacancy; and whereas on the 18th day of April, 1883, the said Gerrit L. Lansing did formally accept the position of trustee under said deed of trust;

And whereas, said deed of trust further provided, that for the sake of convenience in making said conveyances, the said trustees should have power to act by attorney, duly nominated and appointed by them jointly by letter of attorney, which should be duly acknowledged and recorded in each and all the counties in which said lands, or any part thereof, are situated, and that all deeds made in their names by such attorney should have the same force and effect as if made by them in person;

And whereas, on the 21st day of April, 1883, said trustees, D. O. Mills and Gerrit L. Lansing, acting under the power so vested in them, did nominate, constitute and appoint, by letter of attorney duly acknowledged and recorded as aforesaid, Jerome Madden of the city and county of San Francisco and

State of California, their true and lawful attorney, in their names, place and stead, to make, execute and deliver all conveyances required of them as aforesaid;

the lands here after described, pursuant to the fore- the lands hereafter described, pursuant to the foregoing conditions, to the "Atlantic and Pacific Fiber Importing and Manufacturing Company, Limited," of London, England, for the sum of five thousand and eighteen 78/100 ($5,018.78) dollars, which sum has been by it fully paid to the said D. O. Mills and Gerrit L. Lansing, trustees as aforesaid:

Now, therefore, in consideration of the premises, and the said sum of five thousand and eighteen ($5,-018.78) .78 dollars, the receipt whereof is hereby acknowledged, the said Southern Pacific Railroad Company, and the said D. O. Mills and Gerrit L. Lansing, trustees as aforesaid, do grant, bargain, sell and convey to the said Altantic and Pacific Fiber Importing and Manufacturing Company, "Limited," and to its successors and assigns, the following described tracts of land situate, lying and being in the county of Los Angeles, and state of California, to wit:

The southwest quarter (SW. ¼) of section seventeen (17); all of fractional section nineteen (19); all

of section twenty-one (21); all of section twenty-seven (27), in twonship five (5) north or range ten (10) west; the southwest quarter (SW. ¼) of section three (3); all of fractional section five (5); all of section nine (9); west half (W. ½) of section eleven (11), in township five (5) north of range eleven (11) west; all of fractional section one (1), in township five (5) north range twelve (12) west, and west half (W. ½) of section No. thirty-three (33), in township six (6) north of range eleven (11) west; all in San Bernardino base and meridian, containing five thousand and eighteen (5,018.78) 78 acres according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging; reserving all claim of the United States to the same as mineral land.

To have and to hold the aforesaid premises, to the said Atlantic and Pacific Fiber Importing and Manufacturing Company, Limited, its successors and assigns, to its and their use and behoof forever.

In testimony whereof, the said Southern Pacific Railroad Company has caused these presents to be signed by its vice-president and secretary, and sealed with its corporate seal; and the said D. O. Mills and Gerrit L. Lansing, trustees, by their said attorney,

Jerome Madden, have subscribed their names and affixed their seals, this twenty-third (23d) day of July, A. D. 1885.

CHAS. F. CROCKER,
Vice-Pres. S. P. R. R. Co.
J. L. WILLCUTT,
Sec. S. P. R. R. Co.
D. O. MILLS, [Seal]
GERRIT L. LANSING, [Seal]
Trustees.
By JEROME MADDEN,
Their Joint Attorney in Fact,
[Seal of Corporation]

NOTE.—The word "heirs" in 13th and 37th lines stricken out and the words "successors" substituted therefor, and the words from "excepting" in the 27th line to "also" in the 33d line stricken out before signing.

CHARLES L. TORBERT,
Notary Public.

State of California,
City and County of San Francisco,—ss.

On this twenty-third (23d) day of July, in the year one thousand eight hundred and eighty-five (1885), before me, Charles J. Torbert, a notary public in and for said city and county of San Francisco, State of California, personally appeared Charles F. Crocker, known to me to be the vice-president, and J. L. Will-

cutt, known to me to be the secretary of the corporation that executed the within instrument; and each of them acknowledged to me that such corporation executed the same; also, on this, the day aforesaid, before me, the notary public aforesaid, personally appeared Jerome Madden, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of D. O. Mills and Gerrit L. Lansing, and acknowledged to me that he subscribed the names of the said D. O. Mills and Gerrit L. Lansing thereto as principals, and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of California, on the day and year above written.

[Notarial Seal] CHARLES J. TORBERT,
Notary Public, in and for the city and county of San Francisco, State of California.

[Endorsed]: Deed No. 4719. Southern Pacific Railroad Co. D. O. Mills and Gerrit L. Lansing, Trustees, to the "Atlantic and Pacific Fiber Importing and Manufacturing Company, Limited." Deed. Dated July 23d, 1885. Recorded at request of J. Drew Gay, July 29, 1885, at 54 min. past 2 P. M. in Book 144, page 179, Records of Los Angeles County. Chas. E. Miles, County Recorder. By W. B. Pritchard, Deputy. 3.50 pd. U. S. Court, Southern

District of California. United States vs. S. P. R. R. Co. 184. Master's and Examiner's Exhibit No. 44. E. H. Lamme, Master and Examiner in Chancery for Respondent.

In the Circuit Court of the United States in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants.

I hereby certify that the foregoing is a full, true, complete and correct copy of the original of Defendants' Exhibit No. 44 introduced before me in said cause and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,

Standing Examiner and Master in Chancery.

[Endorsed] Filed Feb. 23, 1894. Wm. M. Van Dyke, Clerk. ————, Deputy.

Defendants' Exhibit No. 45 in Case No. 184.

No. 4720.

SOUTHERN PACIFIC RAILROAD COMPANY.

LAND DEPARTMENT.

This agreement, made at San Francisco, California, this twenty-third (23) day of July, A. D. 1885, between the Southern Pacific Railroad Company, party of the first part, and The "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited," of London, England, party of the second part, witnesseth:

That the party of the first part, in consideration of the covenants and agreements of the party of the second part, hereinafter contained, agrees to sell to the party of the second part, the following tracts of land, situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States as: All of fractional sections three (3), five (5) and seven (7); all of section nine (9); north half (N. ½) and southeast quarter (SE.¼) section of seventeen (17), in township five (5) north of range ten (10) west; all of fractional section one (frac'l); fractional north half (frac'l N. ½) southeast quarter (SE. ¼) of section three (3); east half (E. ½) of section eleven (11), in township five (5) north of range eleven (11)) west; all of section twenty-nine (29); all of fractional

section thirty-one (frac'l 31), and all of section thirty-three (33), in township six (6) north of range ten (10) west; all of section thirteen (13), fifteen (15), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), east half (E. ½) of thirty-three (33) and all of thirty-five (35) in township six (6) north of range eleven (11) west; all of San Bernardino base and meridian, containing eleven thousand two hundred and fifty--eight 36/100 (11,258.36/100) 36/100 acres, for the sum of eleven thousand two hundred and fifty-eight 36/100 ($11,258.36/100) dollars, gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described, and to pay to the party of the first part the said sum of eleven thousand two hundred and fifty-eight 36/100 ($11,258.36/100) dollars (which sum has this day been fully paid) in United States gold coin of the present standard of value, and, also, to pay all taxes and assessments that may at any time be levied or imposed upon said land, or any part thereof; and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same; and all sums so paid by the party of the first part shall and shall be paid by said party of the second part bear interest at the rate of seven per cent per annum,

to said party of the first part before he shall be entitled to a conveyance of said land.

It is further agreed that upon the punctual payment of said taxes and assessments and interest thereon, and the strict and faithful performance by the party of the second part, its legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, its successors and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed that the party of the second part may at once enter upon, take and hold possession of said land.

It is further agreed between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; and, that in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant;

Therefore, nothing in this instrument shall be considered a guarantee or assurance that patent or title

will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest), to the party of the second part, all moneys that may have been paid to it by it on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to it for damages or costs in case of its failure to obtain and keep such possession.

It is further agreed, that if the party of the first part shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall, in all its provisions, be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a part of said

grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that it will not obtain or hold possession of all or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, except by indorsement, and with the written consent of the party of the first part, and the written promise of the assignees to perform all the undertakings and promises of the party of the second part as above set forth.

In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its secretary and land agent, and the party of the second part has signed its name hereto, by its agent.

JEROME MADDEN,
Land Agent.

J. L. WILLCUTT,
Secretary.

ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING CO., L'D. [Seal]

By J. DREW GAY, [Seal]
Its Agent.

Schedule of Prices at Which the Lands Described in This Contract Have Been Sold this Twenty-third (23d) Day of July, 1885.

Fraction	Sec.	Tp.	Range.	B. & M.	No. of Acres.	Rate per Acre.	Amount.
All of fractional	3	5 N.	10 W.	S. B.	$669.08	$1.00	$669.08
All of fractional	5	5 N.	10 W.	S. B.	661.66	1.00	661.66
All of fractional	7	5 N.	10 W.	S. B.	611.40	1.00	611.40
All of	9	5 N.	10 W.	S. B.	640.00	1.00	640.00
N. ½	17	5 N.	10 W.	S. B.	320.00	1.00	320.00
S. E. ¼	17	5 N.	10 W.	S. B.	160.00	1.00	160.00
All of fractional	1	5 N.	11 W.	S. B.	650.92	1.00	650.92
Frac'l N. ½	3	5 N.	11 W.	S. B.	342.52	1.00	342.52
S. E. ¼	3	5 N.	11 W.	S. B.	160.00	1.00	160.00
E. ½	11	5 N.	11 W.	S. B.	320.00	1.00	320.00
All of	29	6 N.	10 W.	S. B.	640.00	1.00	640.00
All of fractional	31	6 N.	10 W.	S. B.	642.78	1.00	642.78
All of	33	6 N.	10 W.	S. B.	640.00	1.00	640.00
All of	13	6 N.	11 W.	S. B.	640.00	1.00	640.00
All of	15				640.00	1.00	640.00
All of	21				640.00	1.00	640.00
All of	23				640.00	1.00	640.00
All of	25				640.00	1.00	640.00
All of	21				640.00	1.00	640.00
E. ½	33				320.00	1.00	320.00
All of	35				640.00	1.00	640.00

JEROME MADDEN,
Land Agent.

State of California,
County of Los Angeles,—ss

On this 8th day of March, one thousand eight hundred and eighty-six, before me, W. H. Gray, a notary public in and for said Los Angeles County, residing

therein, duly commissioned and sworn, personally appeared J. Drew Gay, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of Los Angeles, the day and year first above written.

[Notarial Seal] W. H. GRAY,
Notary Public.

State of California,
City and County of San Francisco,—ss.

On this thirteenth day of January, A. D. one thousand eight hundred and eighty-six, before me, Holland Smith, a notary public, in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Jerome Madden, known to me to be the Land Agent, and J. L. Willcutt, known to me to be the Secretary of the Southern Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city

and county of San Francisco, the day and year last above written.

[Notarial Seal] HOLLAND SMITH,
Notary Public.
307 Montgomery St.

In consideration of the above and foregoing assignments to me, I hereby agree with the said Atlantic and Pacific Fibre I. & M. Co. and with the said Southern Pacific Railroad Company, that I will do and perform all the stipulations and conditions in the said contract, No. 4720, required to be done and performed by the said assignor.

March 18, 1893.

J. A. GRAVES. [Seal]

San Francisco, Cal., March 28th, 1893.

The Southern Pacific Railroad Company, hereby consents to the annexed assignment of the within contract, No. 4720, to J. A. Graves.

SOUTHERN PACIFIC RAILROAD COMPANY,
By JEROME MADDEN,
Its Land Agent.

In the Circuit Court of the United States in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants.

I hereby certify that the foregoing is a full, true complete and correct copy of the original Defendants' Exhibit No. 45, introduced before me in said cause and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,

Standing Examiner and Master in Chancery.

[Endorsed]: Unpatented Lands. No. 4720. Contract for a Deed. Southern Pacific R. R. Company to The "Atlantic and Pacific Importing and Manufacturing Company, Limited." Dated July 23d, 1885. Recorded at Request of Wells, Fargo & Co. April 16, 1886, at 4 Min. past 9 A. M., in Book 158, page 23, Records of Los Angeles County. Frank A.

Gibson, County Recorder. By ————. 4.30 Due. U. S. Cir. Court, Southern District of California. United States vs. S. P. R. R. Co., 184 Master's and Examiner's Exhibit No. 45. E. H. Lamme, Master and Examiner in Chancery. For Defendant. Filed Feb. 23, 1894. Wm. M. Van Dyke, Clerk. ————, Deputy.

Defendants' Exhibit No 46 in Case No. 184.

No. 4720.

SOUTHERN PACIFIC RAILROAD COMPANY.
LAND DEPARTMENT.

This agreement, made at San Francisco, California, this twenty-third (23d) day of July, A. D. 1885, between the Southern Pacific Railroad Company, party of the first part, and the "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited," of London, England, party of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter contained, agrees to sell to the party of the second part, the following tracts of land, situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States, as all of fractional sections one (1) three (3) and five (5). All of sections nine (9),

eleven (11), thirteen (13), fifteen (15), seventeen (17), twenty-one (21), twenty-three (23), twenty-seven (27) and thirty-three (33), in township six (6), north of range twelve (12) west. All of San Bernardino base and meridian, containing seventy-six hundred and sixty-eight (7668 27/100) 27/100 acres, for the sum of seventy-six hundred and sixty-eight 27/100 ($7668.27/100) dollars, gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described, and to pay to the party of the first part the said sum of seventy-six hundred and sixty-eight 27/100 (7668.27/100) dollars, (which sum has this day been fully paid) in United States gold coin of the present standard of value, and also to pay all taxes and assessments that may at any time be levied or imposed upon said land, or any part thereof; and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same; and all sums so paid by the party of the first part shall bear interest at the rate of seven per cent per annum, and shall be paid by said party of the second part to said party of the first part before he shall be entitled to a conveyance of said land.

It is further agreed, that upon the punctual payment of said taxes and assessments, and interest thereon, and the strict and faithful performance by the party of the second part, its legal representatives or assigns, of all the agreements herein contained, the party of the first part, will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, its successors and assigns a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land, and also reserving therein to the party of the first part for railroad purposes, a strip of land one hundred feet wide, lying equally on each side of the track of the railroad of said company and all branch railroads now or hereafter constructed thereon, and the right to use all water needed for the operating and repair of said railroads, and with the condition that the party of the second part, its successors and assigns, shall erect and forever maintain good and sufficient fences on both sides of said strip or strips of land.

It is further agreed, that the party of the second part may at once enter upon, take and hold possession of said land.

It is further agreed, between the parties hereto, that the party of the first part claims all the tracts

hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; and, that in consequence of circumstances beyond its control, it some times fails to obtain patent for lands that seem to be legally a portion of its said grants. Therefore, nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest), to the party of the second part, all moneys that may have been paid to it by it on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to it for damages or costs in case of its failure to obtain and keep such possession.

It is further agreed, that if the party of the first part, shall obtain patent for part of the lands herein

described and shall fail to obtain patent for the remainder of them, this contract shall, in all its provisions, be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part, and that it will not obtain or hold possession of all or any of them adversely to said party of the first part.

And it is further agreed, that this contract shall not be assignable, except by indorsement and with the written consent of the party of the first part, and the written promise of the assignee to perform all the undertakings and promises of the party of the second part as above set forth.

In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its Secretary, and Land Agent, and the party of

the second part has signed its name hereto, by its Agent.

JEROME MADDEN,
Land Agent.

J. L. WILLCUTT,
Secretary.

ATLANTIC & PACIFIC FIBRE IMPORTING & MANUFACTURING COMPANY, LIMITED. [Seal]

By J. DREW GAY, [Seal]
Its Agent.

Schedule of Prices at which the Lands Described in this Contract Have Been Sold, this Twenty-third (23d) Day of July, 1885.

Fraction	Sec.	Tp.	Range.	B. & M.	No. of Acres.	Rate per Acre.	Amount.
All of fractional	1	6 N.	12 W.	S. B.	$637.98	$1.00	$637.98
All of fractional	3	6 N.	12 W.	S. B.	636.17	1.00	636.17
All of fractional	5	6 N.	12 W.	S. B.	634.12	1.00	634.12
All of	9	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	11	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	13	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	15	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	17	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	21	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	23	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	27	6 N.	12 W.	S. B.	640.00	1.00	640.00
All of	33	6 N.	12 W.	S. B.	640.00	1.00	640.00

JEROME MADDEN,
Land Agent.

State of California,
County of Los Angeles,—ss.

On this 8th day of March, one thousand eight hundred and eighty-six, before me, W. H. Gray, a notary public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared J. Drew Gay, known to me to be the person described in and whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of Los Angeles, the day and year first above written.

[Notarial Seal] W. H. GRAY,
Notary Public.

State of California,
City and County of San Francisco,—ss.

On this thirteenth day of January, A. D., one thousand eight hundred and eight-six, before me, Holland Smith, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Jerome Madden, known to me to be the Land Agent, and J. L. Willcutt, known to me to be the Secretary of the Southern Pacific Railroad Company, the corporation that exe-

cuted the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year last above written.

[Notarial Seal] HOLLAND SMITH,
Notary Public, 307 Montgomery St.

In consideration of the above and foregoing assignment to me, I hereby agree with the said Atlantic & Pacific Fibre Importing & Manufacturing Co., and with the Southern Pacific Railroad Company, that I will do and perform all the stipulations and conditions in the said Contract No. 4721, required to be done and performed by the said assignor.

March 18, 1893.

J. A. GRAVES. [Seal]

San Francisco, Cal., March 28th, 1893.

The Southern Pacific Railroad Company hereby consents to the annexed assignment of the within contract, No. 4721, to J. A. Graves.

SOUTHERN PACIFIC RAILROAD COMPANY.

By JEROME MADDEN,
Its Land Agent.

In the Circuit Court of the United States in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,

Complainant.

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants.

I hereby certify that the foregoing is a full, true, complete and correct copy of the original of Defendants' Exhibit No. 46, introduced before me in said cause, and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,

Standing Examiner and Master in Chancery.

[Endorsed]: Unpatented Lands. No. 4721. Contract for a Deed. Southern Pacific R. R. Company to The "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited." Dated July 23d, 1885. Recorded at request of Wells, Fargo & Co., April 16, 1886, at 5 min. past 9 A. M. in Book 155, Page 380, Records Los Angeles County. Frank A. Gibson, County Recorder, by W. B. Pritchard,

Deputy. 3.90 due. U. S. Cir. Court, Southern District, California. United States vs. S. P. R. R. Co. 184. Master's and Examiner's Exhibit No. 46. E. H. Lamme. ———, for Defendant. Filed Feb. 23, 1894. Wm. M. Van Dyke, Clerk. ———, Deputy.

Defendants' Exhibit No. 47 in Case No. 184.

No. 4722.

SOUTHERN PACIFIC RAILROAD COMPANY, LAND DEPARTMENT.

This agreement, made at San Francisco, California, this Twenty-third (23d) day of July, A. D. 1885, between the Southern Pacific Railroad Company, party of the first part, and the "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited," of London, England, party of the second part;

Witnesseth: That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter contained, agrees to sell to the party of the second part the following tracts of land, situated in the Counties of Los Angeles and Kern, State of California, and known and designated on the public surveys of the United States as all of fractional section seven (frac'l 7) in township eight (8), north of range fourteen (14) west; all of section five (5); all of fractional section seven (frac'l 7); all of sections (9), eleven (11), thirteen (13), fif-

teen (15), seventeen (17); all of fractional nineteen (frac'l 19); all of twenty-one (21), twenty-nine (29) and all of fractional thirty-one (frac'l 31) in township eight (8) north, of range fifteen (15) west; all of fractional section thirty-one (frac'l 31) in township nine (9) north, of range fifteen (15) west; all of San Bernardino base and meridian, containing eighty-two hundred and seventy-three (8273 34/100) 34/100 acres, for the sum of eighty-two hundred and seventy-three 34/100 ($8273.34/100) dollars, gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described and to pay to the party of the first part the said sum of eighty-two hundred and seventy-three 34/100 ($8273.34/100) dollars (which sum has this day been fully paid) in United States gold coin of the present standard of value, and also to pay all taxes and assessments that may, at any time, be levied or imposed upon said land, or any part thereof, and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same; and all sums so paid by the party of the first part shall bear interest at the rate of seven per cent per annum, and shall be paid by said party of the second

part to said party of the first part before he shall be entitled to a conveyance of said land.

It is further agreed, that upon the punctual payment of said taxes and assessments, and interest thereon, and the strict and faithful performance by the party of the second part, its legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, its successors and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed, that the party of the second part may at once enter upon, take and hold possession of said land.

It is further agreed, between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; and that in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant; therefore, nothing in this instrument shall be considered a guarantee or assurance that patent

or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described; it will, upon demand, repay (without interest) to the party of the second part, all moneys that may have been paid to it on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to it for damages or costs in case of its failure to obtain and keep such possession.

It is further agreed, that if the party of the first party shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder delay or impede the obtaining of patent for them by party of the first part; and

that it will not obtain or hold possession of all or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, except by endorsement, and with the written consent of the party of the first part and the written promise of the assignee to perform all the undertakings and promises of the party of the second part as above set forth.

In testimony whereof, the party of the first part has caused these presents to be signed, in duplicate, by its Secretary and Land Agent, and the party of the second part has signed its name hereto, by its agent.

JEROME MADDEN,
Land Agent.
J. L. WILLCUTT,
Secretary.

ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED.

[Seal] By J. DREW GAY,
Its Agent.

Schedule of Prices at Which the Lands Described in this Contract Have Been Sold this Twenty-third (23d) Day of April, 1885.

Fraction	Sec.	Tp.	Range.	B. & M.	No. of Acres.	Rate per Acre.	Amount.
All of fractional	7	8 N.	14 W.	S. B.	$629.06	$1.00	$629.06
All of	5	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of fractional	7	8 N.	15 W.	S. B.	628.16	1.00	628.16
All of	9	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of	11	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of	13	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of	15	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of	17	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of fractional	19	8 N.	15 W.	S. B.	631.42	1.00	631.42
All of	21	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of	29	8 N.	15 W.	S. B.	640.00	1.00	640.00
All of fractional	31	8 N.	15 W.	S. B.	636.70	1.00	636.70
All of fractional	31	9 N.	15 W.	S. B.	628.00	4.00	628.00

JEROME MADDEN,
Land Agent.

State of California,
County of Los Angeles,—ss.

On this 8th day of March, one thousand eight hundred and eighty-six, before me, W. H. Gray, a notary public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared J. Drew Gay, known to me to be the person described in, and whose name is subscribed to, the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of Los Angeles, the day and year first above written.

[Notarial Seal] W. H. GRAY,
Notary Public.

State of California,
City and County of San Francisco,—ss.

On this thirteenth day of January, A. D. one thousand eight hundred and eighty-six, before me, Holland Smith, a Notary Public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Jerome Madden, known to me to be the Land Agent, and J. L. Willcutt, known to me to be the Secretary, of the Southern Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year last above written.

[Notarial Seal] HOLLAND SMITH,
Notary Public, 307 Montgomery St.

In consideration of the above and foregoing assignment to me, I hereby agree with the said Atlantic & Pacific Fibre Importing & Mfg. Co. and with the

Southern Pacific Railroad Company, that I will do and perform all the stipulations and conditions in the said Contract No. 4722, required to be done and performed by the said assignor.

March 18th, 1893.

J. A. GRAVES. [Seal]

San Francisco, Cal., March 28th, 1893.

The Southern Pacific Railroad Company hereby consents to the annexed assignment of the within contract No. 4722 to J. A. Graves.

SOUTHERN PACIFIC RAILROAD COMPANY,

By JEROME MADDEN,

Its Land Agent.

[Endorsed]: Unpatented Lands. No. 4722. Contract for a Deed. Southern Pacific R. R. Company to "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited." Dated July 23d, 1885. Recorded at request of Wells, Fargo & Co., April 15th, 1886, at 30 min. past 8 A. M., in Book 1, Contracts & Agreements, Page 276, Records of Kern County. N. R. Packard, County Recorder. By ————, Deputy. Fees, $4.60. (Seal of County Recorder.) Recorded at Request of Wells, Fargo & Co., April 20, 1886, at 20 min. past 10 A. M., in Book 159 of Deeds, page 87, Records of Los Angeles County. Frank A. Gibson, County Recorder. By

W. B. Pritchard, Deputy. $4.10 due. U. S. Cir Court, Southern District, California. United States vs. S. P. R. R. Co. 184. Master's and Examiner's Exhibit No. 47. E. H. Lamme, for Respondents.

In the Circuit Court of the United States in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

I hereby certify that the foregoing is a full, true, complete and correct copy of the original of Defendants' Exhibit No. 47 introduced before me in said cause and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,

Standing Examiner and Master in Chancery.

[Endorsed]: Filed Feb. 23, 1894. Wm. M. Van Dyke, Clerk.

Defendants' Exhibit No. 48 in Case No. 184.

SOUTHERN PACIFIC RAILROAD COMPANY.
LAND DEPARTMENT.

No. 4723.

This agreement, made at San Francisco, California, this twenty-third (23d) day of July, A. D. 1885, between the Southern Pacific Railroad Company, party of the first part, and the "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited," of London, England, party of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter contained, agrees to sell to the party of the second part, the following tracts of land situated in the County of Los Angeles, State of California, and known and designated on the public surveys of the United States as all of fractional sections five (5) and seven (7); all of sections nine (9) and seventeen (17); fractional section nineteen (19); all of sections twenty-one (21) and twenty-nine (29); fractional section thirty-one (31); all of section thirty-three (33), in township seven (7) north, range eleven (11) west; all of fractional sections one (1) and three (3) southwest quarter of northeast quarter (SW. 1/4 of N. E. 1/4), west half of southeast quarter (W. 1/2 of SE. 1/4), and west

half (W. 1/2) of section eleven (11); all of section thirteen (13), fractional section nineteen (19); all of sections twenty-three (23), twenty-five (25), twenty-nine (29), thirty-three (33) and thirty-five (35), in township seven (7) north, range twelve (12) west; all of section twenty-five (25), in township seven (7) north, range thirteen (13) west; all of fractional sections five (5) and seven (7) in township eight (8) north, range ten (10) west; all of section eleven (11); fractional section nineteen (19); all of section twenty-nine (29); fractional section thirty-one (31), in township eight (8) north, range eleven (11) west; all of sections twenty-five (25) and thirty-five (35), in township eight (8) north, range twelve (12) west; all of San Bernardino base and meridian, containing seventeen thousand seven hundred and sixty-eight (17,768 41/100) 41/100 acres, for the sum of seventeen thousand seven hundred and sixty-eight ($17,768 41/100) 41/100 dollars, gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described, and to pay to the party of the first part the said sum of seventeen thousand seven hundred and sixty-eight (17,768 41/100) 41/100 dollars (which sum has this day been fully paid), in United States gold coin of the present standard of value, and, also, to pay all taxes and assessments that may

at any time be levied or imposed upon said land, or any part thereof; and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same; and all sums so paid by the party of the first part shall bear interest at the rate of seven per cent per annum, and shall be paid by said party of the second part to said party of the first part before he shall be entitled to a conveyance of said land.

It is further agreed, that upon the punctual payment of said taxes and assessments, and interest thereon, and the strict and faithful performance by the party of the second part, its legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, its successors and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land, and also reserving therein to the party of the first part for railroad purposes, a strip of land one hundred feet wide, lying equally on each side of the track of the railroad of said company, and all branch railroads now or hereafter constructed thereon, and the right to use all water needed for the operating and repair of said

railroads, and with the condition that the party of the second part, its successors and assigns, shall erect and forever maintain good and sufficient fences on both sides of said strip or strips of land.

It is further agreed, that the party of the second ——— may at once enter upon, take and hold possession of said land.

It is further agreed, between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; and, that in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant; therefore, nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part, all moneys that may have been paid to it by it on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts, by said party of the first part, as per schedule on page 3 hereof; that

said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to it for damages or costs in case of its failure to obtain and keep such possession.

It is further agreed, that if the party of the first part shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayment herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that it will not obtain or hold possession of all or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, except by indorsement, and with the written consent of the party of the first part, and the written promise of the assignee to perform all the under-

takings and promises of the party of the second part as above set forth.

In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its Secretary and Land Agent, and the party of the second part has signed its name hereto, by its Agent.

JEROME MADDEN,
Land Agent.

J. L. WILCUTT,
Secretary.

ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED, [Seal]
By J. DREW GAY,
Its Agent.

Schedule of Prices at Which the Lands Described in this Contract have been Sold this Twenty-third (23d) Day of July, 1885.

Fraction	Sec.	Tp.	Range.	B. & M.	No. of Acres.	Rate per Acre.	Amount.
All of fractional	5	7 N.	11 W.	S. B.	$646.78	$1.00	$646.78
All of fractional	7	7 N.	11 W.	S. B.	645.18	1.00	645.18
All of	9	7 N.	11 W.	S. B.	640.00	1.00	640.00
All of	17	7 N.	11 W.	S. B.	640.00	1.00	640.00
All of fractional	19	7 N.	11 W.	S. B.	641.21	1.00	641.21
All of	21	7 N.	11 W.	S. B.	640.00	1.00	640.00
All of	29	7 N.	11 W.	S. B.	640.00	1.00	640.00
All of fractional	31	7 N.	11 W.	S. B.	642.56	1.00	642.56
All of	33	7 N.	11 W.	S. B.	640.00	1.00	640.00
All of fractional	1	7 N.	12 W.	S. B.	643.00	1.00	643.00
All of fractional	3	7 N.	12 W.	S. B.	645.98	1.00	645.98
S. W. ¼ of N. E. ¼		7 N.	12 W.	S. B.	440.00	1.00	440.00
W. ½ of S. E. ¼	11	7 N.	12 W.	S. B.			
and W. ½		7 N.	12 W.	S. B.			
All of	13	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of fractional	19	7 N.	12 W.	S. B.	645.92	1.00	645.92
All of	23	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of	25	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of	29	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of	33	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of	35	7 N.	12 W.	S. B.	640.00	1.00	640.00
All of	25	7 N.	13 W.	S. B.	640.00	1.00	640.00
All of fractional	5	8 N.	10 W.	S. B.	639.28	1.00	639.28
All of fractional	7	8 N.	10 W.	S. B.	628.84	1.00	628.84
All of	11	8 N.	11 W.	S. B.	640.00	1.00	640.00
All of fractional	19	8 N.	11 W.	S. B.	654.78	1.00	654.78
All of fractional	29	8 N.	11 W.	S. B.	640.00	1.00	640.00
All of fractional	31	8 N.	11 W.	S. B.	654.88	1.00	654.88
All of	25	8 N.	12 W.	S. B.	640.00	1.00	640.00
All of	35	8 N.	12 W.	S. B.	640.00	1.00	640.00

JEROME MADDEN,
Land Agent.

State of California,
County of Los Angeles,—ss.

On this 8th day of March, one thousand eight hundred and eighty-six, before me, W. H. Gray, a notary public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared J. Drew Gray, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of Los Angeles, the day and year first above written.

[Notarial Seal] W. H. GRAY,
Notary Public.

State of California,
City and County of San Francisco,—ss.

On this thirteenth day of January, A. D. one thousand eight hundred and eighty-six, before me, Holland Smith, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Jerome Madden, known to me to be the Land Agent, and J. L. Willcutt, known to me to be the Secretary of the Southern

Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, the day and year last above written.

[Notarial Seal] HOLLAND SMITH,
Notary Public.
807 Montgomery St.

In consideration of the above and foregoing assignment to me, I hereby agree with the said Atlantic & Pacific Fibre Importing & Manufacturing Co. and with the Southern Pacific Railroad Company, that I will do and perform all the stipulations and conditions in the said contract No. 4273, required to be done and performed by the said assignor.

March 18th, 1893.

J. A. GRAVES. [Seal]

San Francisco, Cal., March 28th, 1893.

The Southern Pacific Railroad Company hereby consents to the annexed assignment of the within contract, No. 4723, to J. A. Graves.

SOUTHERN PACIFIC RAILROAD COMPANY,
By JEROME MADDEN,
Its Land Agent.

In the Circuit Court of the United States, in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants.

I hereby certify that the foregoing is a full, true, complete and correct copy of the original of Defendants' Exhibit No. 48, introduced before me in said cause and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,

Standing Examiner and Master in Chancery.

[Endorsed]: Unpatented Lands. No. 4723. Contract for a Deed. Southern Pacific R. R. Company to the "Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited." Dated July 23d, 1885. Recorded at Request of Wells, Fargo & Company, April 16, 1886, At 6 min. past 9 A. M. in Book 155, page 374, Records Los Angeles County. Frank A. Gibson, County Recorder. By W. P.

Prichard, Deputy. 4.70 due. U. S. Circuit Court, Southern District California. United States vs. S. P. R. R. Co., 184 Master's and Examiner's Exhibit No. 48. E. H. Lamme, Master and Examiner in Chancery. Filed Feb. 22, 1894. Wm. M. Van Dyke, Clerk. ————————, Deputy.

Defendants' Exhibit No. 49 in Case No. 184

RESOLVED, That the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, a corporation duly organized and existing under the laws of Great Britain, for and in consideration of the sum of fifty thousand dollars ($50,000.00) to it in hand paid, will convey to Jackson Alpheus Graves, Attorney at Law, resident of Alhambra, in the County of Los Angeles, State of California, and having his office and place of business at Rooms 19, 20 and 21, Baker Block, City of Los Angeles, County of Los Angeles, State of California, all those certain tracts of land situated in the County of Los Angeles and State of California, particularly described as follows, to wit:

Section 7, township 8 north, range 14 west;

Sections 5, 7, 9, 11, 13, 15, 17, 19, 21, 29 and 31, in township 8 north, range 15 west;

Sections 29, 31 and 33 in township 6 north, range 10 west;

Sections 5 and 7 in township 8 north, range 10 west;

Sections 13, 15, 21, 23, 25, 27, 33 and 35 in township 6 north, range 11 west;

Sections 5, 7, 9, 17, 19, 21, 29, 31 and 33 in township 7 north, range 11 west;

Sections 11, 19, 29, and 31, in township 8 north, range 11 west;

Sections 1, 3, 5, 9, 11, 13, 15, 17, 21, 23, 27 and 33 in township 6 north, range 12 west;

Sections 1, 3, 11, 13, 19, 23, 25, 29, 33 and 35 in township 7 north, range 12 west;

Sections 25 and 35 in township 8 north, range 12 west;

Section 25 in township 7 north, range 13 west;

Section 1, in township 5 north, range 12 west;

Sections 1, 3, 5, 9 and 11 in township 5 north, range 11 west; and

Sections 3, 5, 7, 9, 17, 19, 21 and 27 in township 5 north, range 10 west—All in San Bernardino Base and Meridian.

And will also sell, assign, transfer and set over to the said Jackson Alpheus Graves that certain agreement, dated July 23, 1885, between the Southern Pacific Railroad Company, party of the first part, and said Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, a corporation, of London, England, party of the second part, re-

corded in Book 155, page 374, of Deeds, in the office of the Recorder of Los Angeles County, California.

Also that other agreement to convey, executed by the same party to the same party, dated July 23, 1885, recorded in Book 155, page 380, of Deeds, in the office of the Recorder of Los Angeles County, State aforesaid.

Also that other certain agreement, dated July 23, 1885, between the same parties, recorded in Book 158, page 23, of Deeds, in the office of the Recorder of Los Angeles County.

Also that other certain agreement between the same parties, dated July 23, 1885, recorded in Book 159, page 87, of Deeds, in the office of the Recorded of Los Angeles County.

Together with all the rights, of every nature and description of said Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, under said agreements, and each of them. And will authorize the said Graves to enforce said agreements, and each and every of them, for his own use and benefit.

And James Morton Bell, President, and Courtenay Clarke, Secretary of said corporation, are hereby authorized, empowered and directed, for and on behalf of, and as the act of said corporation, to make, execute and deliver to the said Graves a deed, grant, bargain and sale in form, conveying to him all of the

property hereinbefore described, including the said real property, and said agreements to convey.

Office of the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, Suffolk House, Laurence Poutney Hill, E. C., London, England.

I hereby certify the foregoing to be a true copy of a Resolution duly entered on the 27th day of January, 1893, in the minutes of the Board of Directors of the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, by virtue of a resolution duly adopted by said Board, at a meeting thereof duly held on said 27th day of January, 1893.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said corporation, this 27th day of January, 1893.

[Corporate Seal] COURTENAY CLARKE,
Secretary of the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited.

(The seal of the Company was affixed in the presence of James Morton Bell, President, Courtenay Clarke, Secretary.)

Whereas, the Atlantic & Pacific Fibre Importing and Manufacturing Company, Limited, is a corporation duly formed and existing under the laws of England, and is doing business in the State of California, United States of America, and has its principal place of business, for such business as it transacts in said

United States of America, in the County of Los Angeles, in the State of California; and

Whereas, said corporation, by the foregoing Resolution, did agree to sell and convey to Jackson Alpheus Graves, described in said Resolution, the real property in said Resolution described, and did further agree to sell, assign, transfer and set over the agreement in said Resolution described, to said Graves;

Now, therefore, in consideration of said Resolution, and of the payment to it of the sum of fifty thousand dollars ($50,000.00), as in said Resolution stated.

This agreement, made this 27th day of January, 1893, between said Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, a corporation duly organized and existing under the laws of Great Britain, party of the first part, and Jackson Alpheus Graves, Attorney at Law, resident of Alhambra, in the County of Los Angeles, State of California, having his office and place of business at Rooms 19, 20 and 21, Baker Block, City of Los Angeles, County of Los Angeles, State of California, party of second part, witnesseth:

That the party of the first part does, by these

presents, grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces or parcels of land, situate, lying and being in the said County of Los Angeles, State of California, particularly described in said Resolution, and does further sell, assign, transfer and set over to said party of the second part those certain contracts and agreements executed by the Southern Pacific Railroad Company, a corporation, to said party of the first part, which said contract and agreements are fully described in said Resolution; and does hereby authorize the said party of the second part to enforce said agreements, and each and every of them for his own use and benefit.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the Atlantic & Pacific Fibre Importing & Manufacturing Company, Limited, has

caused its corporate name and seal, by virtue of the Resolution aforesaid, to be
W. E. V. hereunto affixed, and these presents to be
N. P. executed by James Morton Bell, its Presi-
J. M. B. dent, and Courtenay Clarke, its Secretary,
C. C. this 27th day of January, 1893.

THE ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED,

[Corporate Seal]

By JAMES MORTON BELL,
President.

And COURTENAY CLARKE,
Secretary.

(The seal of the Company was affixed in the presence of James Morton Bell, President, Courtenay Clarke, Secretary.)

Kingdom of Great Britain,
County of Middlesex,—ss.

On this twenty-seventh day of January, 1893, before me, William Eustace Venn, Notary Public in and for said County of Middlesex, in England, duly commissioned and sworn, personally appeared James Morton Bell and Courtenay Clarke, known to me to be the same President and Secretary, respectively, of the corporation described in, and who executed the within annexed instrument, and acknowl-

edged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city of London, County of Middlesex, the day and year in this certificate first above written.

Veritas:

[Notarial Seal] W. F. VENN,

Notary Public in and for the County of Middlesex, Kingdom of Great Britain.

(Postage Revenue 27/1/93 One Shilling.)

E. PLURIBUS UNUM.

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA FOR GREAT BRITAIN AND IRELAND AT LONDON.

I, John C. New, Counsul-general of the United States of America, at London, England, do hereby make known and certify to all whom it may concern, that William Eustace Venn, who hath signed the annexed certificate, is a notary public, duly admitted and sworn, and practicing in the city of London, aforesaid, and that to all acts by him so done full faith and credit are and ought to be given in Judicature and thereout.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at London aforesaid, this twenty-seventh day of January, in the year

of our Lord one thousand eight hundred and ninety-three.

[U. S. Consulate General Seal]

JNO. C. NEW,
Consul General.

In the Circuit Court of the United States, in and for the Southern District of California.

184.

UNITED STATES OF AMERICA,
Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,
Defendants.

I hereby certify that the foregoing is a full, true, complete and correct copy of the original of Defendants' Exhibit No. 49 introduced before me in said cause and the original of which was withdrawn by stipulation of the solicitors of the respective parties.

E. H. LAMME,
Standing Examiner and Master in Chancery.

[Endorsed]: Deed. The Atlantic & Pacific Fibre Fibre Importing & Manufacturing Co. to Jackson Alpheus Graves. Dated January 27th, 1893. Recorded at Request of J. A. Graves, Feb. 15, 1893,

at 40 min. past 3 P. M., in Book 837, page 183 of Deeds, Los Angeles County Records. Arthur Bray, County Recorder. By A. A. Bayley, Deputy. 390-35. 79. D. U. S. Cir. Court, Southern District California. United States vs. S. P. R. R. Co. 184. Master's and Examiner's Exhibit No. 49 for Respondent. E. H. Lamme. Filed Feb. 23, 1894. Wm. M. Van Dyke, Clerk. ————, Deputy.

Defendants' Exhibit Before the Special Examiner, No. 9 in Case No. 184.

PATENT No. 1 (BRANCH LINE) SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA.

The United States of America, To All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress approved July 27th, 1866, and "Joint Resolution," of June 28th, 1870, "to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas, to the Pacific Coast, and to secure to the Government the use of the same for Postal, Military and other purposes," authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco, to a point of con-

nection with the Atlantic and Pacific Railroad, near the boundary line of said State, and provision is made for granting to the said Company, "every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed";

And whereas, it is further provided by said Act, that "whenever, prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, or occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections, and not included in the reserved numbers";

And whereas, It is further enacted by the 23d Section of the Act of March 3d, 1871, "for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad Company of California is authorized to construct a line of railroad from a point at or near Tehachapi

Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Company of California," by the aforesaid Act of July 27th, 1866;

And whereas, official statements bearing dates May 11th, 1874, and November 13th, 1875, from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the Fourth Section of the said Act of July 27th, 1866, have reported to him that the line of said branch railroad and telegraph, from a point in the northwest quarter of section three (3) township two (2) north range fifteen (15) west, San Bernardino Meridian, to a point in the southwest quarter of section four (4), township three (3) south, range one (1) west, at San Gargonio Pass, making one hundred miles of road constructed and fully completed and equipped in the manner prescribed by the said Act of July 27th, 1866.

And whereas, it is further shown, that copies of the report of said Commissioners, have been filed in the Department of the Interior, with copies of the order of the President of the United States, dated May 9, 1874, and November 8, 1875, of the completion of the above portion of said railroad and telegraph line.

And whereas, certain tracts have been selected under the said Act of March 3d, 1871, by Benjamin B. Redding, Land Agent of the said Southern Pacific Railroad Company, as shown by his original list of selections, dated January 20th, 1876, and certified January 28th, 1876, by the Register and Receiver at Los Angeles, California. The said tracts being described as follows, to wit:

North of base line and west of San Bernardino meridian, Los Angeles District.

* * * * * * *

TOWNSHIP FOUR, RANGE THIRTEEN.

All of section one, containing six hundred thirty-two acres, and sixty hundredths of an acre. Northwest quarter of southwest quarter, and southwest of southeast quarter of section eleven, containing eighty acres. East half of section thirteen, containing three hundred and twenty acres. South half of northeast quarter of section fifteen, containing eighty acres.

TOWNSHIP FIVE, RANGE TWELVE.

Southwest fractional quarter of section thirty-one, containing one hundred and sixty-four acres, and forty-one hundredths of an acre.

TOWNSHIP FIVE, RANGE THIRTEEN.

South half of section twenty-five, containing three hundred and twenty acres. All of section thirty-five, containing six hundred and forty acres.

* * * * * * *

North base line and west of San Bernardino Meridian. Indemnity Thirty Miles Limits.

TOWNSHIP FOUR, RANGE SEVEN.

South half of section three, containing three hundred and twenty acres. All of section five, containing six hundred and forty-one acres, and ninety-six hundredths of an acre. All of section seven, containing six hundred and eighteen acres and twenty-eight hundredths of an acre. All of section nine, containing six hundred and forty acres. All of section eleven, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. North half of section nineteen, containing three hundred and ten acres and twenty-eight hundredths of an acre. All of section twenty-one, containing six hundred and forty acres. Northwest quarter of section twenty-seven, containing one hundred and sixty acres.

TOWNSHIP FOUR, RANGE EIGHT.

All of section one, containing six hundred and thirty-seven acres, and fifty-six hundredths of an acre. All of section three, containing six hundred and thirty-seven acres and seventy-two hundredths of an acre. All of section five, containing six hundred and forty-six acres, and eighty-eight hundredths

of an acre. Northwest quarter of section seven, containing one hundred and sixty-two acres. Northeast quarter of section nine, containing one hundred and sixty acres. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres.

TOWNSHIP FOUR, RANGE NINE.

Northwest quarter of section three, containing one hundred and sixty acres. All of section five, containing six hundred and forty-six acres and forty-six hundredths of an acre. North half of section seven, containing three hundred and twenty-four acres, and forty hundredths of an acre. North half of section nine, containing three hundred and twenty acres.

TOWNSHIP FOUR, RANGE TEN.

North half of southwest quarter, and north half of section one, containing four hundred and one acres, and eighty hundredths of an acre. Northeast quarter of section three, containing one hundred and sixty-three acres and thirty-six hundredths of an acre. West half of section eleven, containing three hundred and twenty acres.

TOWNSHIP FIVE, RANGE NINE.

All of section twenty-five, containing six hundred and forty acres. South half of section twenty-seven, containing three hundred and twenty acres. South half of section twenty-nine, containing three hundred

and twenty acres. North half of southwest quarter, north half of southeast quarter and north half of section thirty-one, containing four hundred and seventy-five acres, and sixty-eight hundredths of an acre. All of section thirty-three, containing six hundred and forty acres. All of section thirty-five, containing six hundred and forty acres.

TOWNSHIP FIVE, RANGE TEN.

Southwest quarter of section seventeen, containing one hundred and sixty acres. All of section nineteen, containing six hundred and seventeen acres, and eighty-four hundredths of an acre. All of section twenty-one, containing six hundred and forty acres. South half of section twenty-three containing three hundred and twenty acres. South half of section twenty-five, containing three hundred and twenty acres. All of section twenty-seven, containing six hundred and forty acres. Northeast quarter of section twenty-nine, containing one hundred and sixty acres. Northeast quarter of section thirty-three, containing one hundred and sixty acres. All of section thirty-five containing six hundred and forty acres.

TOWNSHIP FIVE, RANGE ELEVEN.

Southwest quarter of section three, containing one hundred and sixty acres. All of section five, containing six hundred and seventy-nine acres, and

forty hundredths of an acre. All of section seven, containing six hundred and fourteen acres, and eighty-eight hundredths of an acre. All of section nine, containing six hundred and forty acres. West half of section eleven, containing three hundred and twenty acres. All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. Northwest quarter of section nineteen, containing one hundred and forty-nine acres, and seventy-two hundredths of an acre. Northeast quarter of section twenty-one, containing one hundred and sixty acres.

TOWNSHIP FIVE, RANGE TWELVE.

All of section one, containing eight hundred and forty-one acres and fifty-four hundredths of an acre. All of section three containing eight hundred and fifty acres and twenty-eight hundredths of an acre. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres. Southeast quarter of section fifteen, containing one hundred and sixty acres. East half and southwest quarter of section nineteen, containing four hundred and eighty-one acres and ninety-two hundredths of an acre. Northwest quarter of section of twenty-three, containing one hundred and sixty acres. All of section twenty-seven, containing six hundred and forty acres. All

of section twenty-nine, containing six hundred and forty acres. Northwest quarter and east half of section thirty-one, containing four hundred and eighty-three acres, and twenty-five hundredths of an acre. All of section thirty-three, containing six hundred and forty acres.

TOWNSHIP FIVE, RANGE THIRTEEN.

North half of section twenty-five, containing three hundred and twenty acres.

TOWNSHIP SIX, RANGE ELEVEN.

West half of section nineteen, containing three hundred and twenty-five acres. West half of section twenty-nine, containing three hundred and twenty acres. All of section thirty-one, containing six hundred and forty-one acres, and eight hundredths of an acre. West half of section thirty-three, containing three hundred and twenty acres.

TOWNSHIP SIX, RANGE TWELVE.

All of section twenty-five, containing six hundred and forty acres. South half of northwest quarter, southwest quarter, and east half of section thirty-five, containing five hundred and sixty acres.

The said tracts as described in the foregoing pages from one to eight inclusive, containing the aggregate area of forty-one thousand one hundred and seventy-eight acres, and twenty-three hundredths of an acre (41,178.23/100).

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said Acts of Congress, have given and granted, and by these presents do give and grant, unto the said Southern Pacific Railroad Company, of California, and to its successors and assigns, the tracts of land above described, mineral land excepted,

To have and to hold the same, together with all rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said Southern Pacific Railroad Company of California, and to its successors and assigns forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth.

By the President,

[Seal] U. S. GRANT.

By D. D. CONE,
Secretary.

C. W. HOLCOMBE,
Recorder of the General Land Office.

Recorded in vol. 5, pages 409 and 417 in.

[Endorsed]: Recorded at request of Jerome Madden, Land Agent of the Southern Pacific Company, December 13th, 1880, at 20 min. past 11 A. M., in Book 2, of Patents, on page 563 et seq., in the recorder's office of Los Angeles County, Cal.

CHAS. C. LAMB,
County Recorder.
By C. H. Dunsmoor,
Deputy.

Fees: $8.70.

[Endorsed]: Recorded at request of Wells, Fargo & Co., March 25th, 1881, at 45 min. past 10 o'clock A. M., in Book A of Patents, on page 444 et seq., Records of San Bernardino County, Cal.

A. F. McKENNEY,
Co. Recorder.
By S. M. Wall,
Deputy.

Fees: 8.75.

(Stamped:) Received Apr. 14, 1876. Answered ———.

(Written in red ink upon the title page:) Mch. 13, 1878. Exd. with List & Tract Book. Areas of Lands Patented herein—41 178.23 acres (Correct).

Marked "Defendants' Exhibit before the Special Examiner No. 9. Stephen Potter, Special Examiner."

I hereby certify that I have compared the foregoing document with the original on file in the office

of the Southern Pacific Railway Company, and find it to be a full, true and correct copy thereof, so far as it involves the lands in suit, and omitting the description of lands that are not in issue.

STEPHEN POTTER,
Special Examiner.

San Francisco, October 13th, 1893.

Filed Dec. 5, 1893. Wm. M. Van Dyke, Clerk, ————, Deputy.

(On margin of page:) United States vs. S. P. R. R. Co. et al. No. 184.

Defendants' Exhibit Before the Special Examiner No. 10 in Case No. 184.

PATENT NO. 2 OF THE BRANCH LINE OF THE SOUTHERN PACIFIC RAILROAD COMPANY.

The United States of America, to All to Whom these Presents Shall Come, Greeting:

Whereas, by the act of Congress approved July 27, 1866, and "Joint Resolution" of June 28th, 1870, "to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to secure to the Government the use of the same for postal, military and other purposes," authority is given to the Southern Pacific Railroad Company of California, a corporation ex-

isting under the laws of the state, to construct a railroad and telegraph line under certain conditions and stipulations expressed in the said act from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of the said state, and provision is made for granting to the said company, "every alternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road not sold, reserved, or other wise disposed of by the United States and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

And whereas, it is further enacted by the 23d section of the act of March 3, 1871, "for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California" is authorized "to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the aforesaid act of July 27, 1866."

And whereas, official statements bearing dates May

11, 1874, November 13, 1875, July 26, 1876, March 3, 1877, and January 30, 1878, from the Secretary of the Interior, have been filed in the General Land Office, showing that commissioners appointed by the President under the provisions of the fourth section of the said act of July 27, 1866, have reported to him that the line of said branch railroad and telegraph, from the town of Mojave, in township eleven north of range twelve west, San Bernardino base and meridian, and thence to the Fort Yuma Reservation, in the southeast quarter of section twenty-six, township sixteen south, range twenty-two, east, same base and meridian, making three hundred and forty-six miles and ninety-six hundredths of a mile of road constructed and fully completed and equipped in the manner prescribed by the said act of July 27, 1866;

And whereas, it is further shown that copies of the reports of said commissioners have been filed in the Department of the Interior with copies of the orders of the President of the United States, dated May 9, 1874, November 8, 1875, July 2, 1876, March 2, 1877, and January 23, 1878, on the completion of the above portion of said railroad and telegraph line;

And whereas, certain tracts have been selected under the said act of March 3, 1871, by Jerome Madden, Land Agent of the said Southern Pacific Railroad Company, as shown by his original list of selections, dated June 27, 1877, and certified July 2, 1877, by

the Register and Receiver at Los Angeles, California. The said tracts being described as follows, to wit:

North of base line and west of the San Bernardino meridian, California.

* * * * * * * * * * * * * * *

TOWNSHIP TWO, RANGE THIRTEEN.

All of section seventeen, containing six hundred and thirty-nine acres and ninety-eight one hundredths of an acre. All of section twenty-one, containing three hundred and sixty-seven acres and sixty-eight one-hundredths of an acre. All of section twenty-five, containing six hundred and forty acres. The east half of the northeast quarter and the lots numbered one, two, and three of section twenty-seven, containing one hundred and fifty-six acres and thirty-two one-hundredths of an acre. The north half of the northeast quarter and the lots numbered one, two, three and four of section thirty-five, containing one hundred and eighty-one acres and fifty-one one-hundredths of an acre.

TOWNSHIP TWO, RANGE FOURTEEN.

The lots numbered one, two three and four, the south half of the southeast quarter, and the south half of the southwest quarter of section twenty-one, containing two hundred and sixty-one acres and sixty-eight one-hundredths of an acre. The lots numbered

one and two, and the northwest quarter of the southwest quarter of section twenty-seven, containing one hundred and nineteen acres and ninety-four one-hundredths of an acre. The east half of the northeast quarter and the lots numbered one, two, three and four of section twenty-nine, containing one hundred and sixty-six- acres and forty-eight- one-hundredths of an acre. All of section thirty-three, containing six hundred and forty acres.

TOWNSHIP TWO, RANGE FIFTEEN.

The lots numbered one, two, three, four, five and six, of section one, containing two hundred and thirty acres and nine one-hundredths of an acre.

* * * * * * * * * * * * * * * *

The said tracts of land as described in the foregoing pages, from 2 to 14, inclusive, make in the aggregate the area of (54,315.42) fifty-four thousand three hundred and fifteen acres and forty-two one-hundredths of an acre.

Now know ye that the United States of America, in consideration of the premises and pursuant to the said acts of Congress have given and granted, and by these presents do give and grant, unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land above described, "mineral land" excepted.

To have and to hold the same, together with all rights, privileges, immunities and appurtenances of whatever thereunto belonging, unto the said Southern Pacific Railroad Company of California, and to its successors and assigns forever.

In testimony whereof, I, Rutherford B. Hayes, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this fourth day of April, in the year of our Lord one thousand eight hundred and seventy-nine and of the Independence of the United States the one hundred and third.

[Seal]

By the President:

R. B. HAYES.

By WM. H. CROOK,

Secretary.

S. W. CLARK,

Recorder of the General Land Office.

Recorded in Vol. 7, pages 86 to 97, inclusive.

[Endorsed]: Recorded at Request of C. Cabot, Feby. 12, 1881, at 45 mins. past 3 P. M. in Book 2 of Patents, page 574, records Los Angeles County.

CHAS. C. LAMB,

County Recorder.

By A. N. Hamilton,

Dept.

$12.70 Paid.

[Endorsed]: Record at Request of C. Cabot, Feby. 18th, 1881, at 50 Min. past 10 o'clock A. M. in Book A of Patents, page 412, et seq., Records San Bernardino County, State of California.

A. F. McKENNEY,
Co. Recorder,
By S. M. Wall,
Deputy.

Fees $12.75.

[Endorsed]: Record at the Request of C. Cabot. February 13th, 1881, at 45 min. past 9 o'clock A. M. in Book 2 of Patents, page 151 Records of San Diego County.

GILBERT DENNIS,
County Recorder.

Fees $12.75.

(Stamped.) Received Apr. 17, 1879. Answered

Marked "Defendants' Exhibit before the Special Examiner No. 10. Stephen Potter, Special Examiner."

I hereby certify that I have compared the foregoing document with the original on file in the office of the Southern Pacific Railroad Company, and find it to be a full, true and correct copy thereof, so far

as it involves the lands in suit, and omitting the descriptions of lands that are not in issue.

STEPHEN POTTER,
Special Examiner.

San Francisco, October 13th, 1893.

(On margin of page): United States vs. S. P. R. R. Co. et al. No. 184.

Filed Dec. 5, 1893, Wm. M. Van Dyke, Clerk.
———— Deputy.

Defendants' Exhibit Before the Special Examiner No. 14 in Case No. 184.

PATENT NO. 6 OF LANDS GRANTED IN CALIFORNIA TO THE SOUTHERN PACIFIC RAILROAD COMPANY, ACT MARCH 3, 1871,

The United States of America, to all to Whom these Presents Shall Come, Greeting:

Whereas, by the act of Congress approved July 27, 1866, and joint resolution of June 28, 1870, "to aid in the construction of a Railroad and Telegraph Line from the State of Missouri and Arkansas to the Pacific Coast," and to secure to the Government the use of the same for Postal, Military, and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State to construct a railroad and telegraph line, under certain conditions

and stipulations expressed in said act from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting to the said company, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office";

And whereas, it is further enacted by the 23d section of the act of March 3, 1871, "for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as

were granted to said Southern Pacific Railroad Company of California," by the aforesaid act of July 27, 1866.

And whereas, official statements bearing dates May 11, 1874, November 13, 1875, July 22, 1876, March 3, 1877, and January 30, 1878, from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the 4th section of the said act of July 27, 1866, have reported to him that the line of said branch railroad and telegraph from the town of Mojave, in township eleven north, of range twelve west, San Bernardino base and meridian, and thence to the Fort Yuma reservation, in the southeast quarter of section twenty-six, township sixteen south, range twenty-two east same base and meridian, making three hundred and forty-six miles and ninety-six one-hundredths of a mile of road has been constructed and fully completed and equipped in the manner prescribed by the said act of July 27, 1866.

And whereas, it is further shown that copies of the report of said commissioners have been filed in the Department of the Interior, with copies of the orders of the President of the United States, dated May 9, 1874, November 8, 1875, July 2, 1876, March 2, 1877, and January 23, 1878 of the completion of the above portion of said railroad and telegraph line.

And whereas, certain tracts have been selected under the act aforesaid, by Jerome Madden, the duly authorized Land Agent of the Southern Pacific Railroad Company, as shown by his original lists of selections dated July 12, 1882, and May 14, 1883, and certified July 14, 1882, March 9, and May 25, 1883, by the Register and Receiver at Los Angeles District, California. The said tracts of land lie coterminus to the constructed line of road and are particularly described as follows, to wit:

North of base line and west of San Bernardino principal meridian, California.

* * * * * * *

TOWNSHIP TWO, RANGE TWELVE.

The lots numbered one, two, the east half of the southwest quarter, and the southeast quarter of section thirty-one, containing three hundred and twenty-one acres.

TOWNSHIP THREE, RANGE FIFTEEN.

All of section twenty-one, containing five hundred and ninety-eight acres and seventy-six one-hundredths of an acre.

* * * * * * *

North of base line and west of San Bernardino principal meridian, California.

* * * * * * *

TOWNSHIP FOUR, RANGE EIGHTEEN.

The northeast quarter, the lot numbered three, and the southeast quarter of the northwest quarter of section nineteen, containing two hundred and thirty-nine acres and seventy-seven one-hundredths of an acre. The northeast quarter of the northeast quarter, the south half of the northeast quarter, the lot numbered one, and the fractional south half of section thirty-one, containing four hundred and eighty acres and eleven one-hundredths of an acre.

* * * * * * *

The said tracts of land as described in the foregoing make the aggregate area of (37,069.97) thirty-seven thousand sixty-nine acres and ninety-seven one-hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute "shall not be construed to include coal and iron lands."

To have and to hold the same, together with all rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, unto the said Southern Pacific Railroad Company of California and to its successors and assigns forever.

In testimony whereof, I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

By the President

CHESTER A. ARTHUR.

[Seal] WM. H. CROOK,

Secretary.

S. W. CLARK,

Recorder of the General Land Office.

[Endorsed]: $10. Recorded at the Request of Wells, Fargo & Co. March 11th, A. D. 1884, at 45 min. past 2 P. M. in Book 1 of Patents, page 257, et seq., Records of Ventura Co., Cal.

JOHN T. STOW,

Recorder.

By I. H. Warring,

Deputy

[Endorsed]: Received for Record March 4, 1884. at 12 o'clock M. at Request of Wells, Fargo & Co., and Recorded in Book No. 3 of Patents, Records San Diego Co., page 115, et seq., Mch. 6, 1884, at ten o'clock and 15 min. A. M.

E. G. HAIGHT,
County Recorder.
By H. T. Christian,
Deputy.

$9.75.

[Endorsed]: Recorded at the Request of Wells, Fargo & Co., Feby. 13th, A. D. 1884, at 8:45 A. M. Book "B" of Land Patents, pages 322, et seq.

W. F. HOLCOMB,
County Recorder, San Bernardino Co.
By E. A. Nisbet,
Deputy.

$8.35.

[Endorsed]: #39. Recorded at request of Wells, Fargo & Co. Apr. 7th, 1890, at 45 min. past 3 P. M., in Book "C" of Patents, page 446, et seq., records San Bernardino County.

A. S. DAVIDSON,
County Recorder.

(Error.) No fee. Re-recorded to correct error in former record.

[Endorsed]: Recorded at Request of C. Cabot, Feby. 9, 1884, at 5 min. past 4 P. M. in Book 3 of Patents, page 328, et seq. Records Los Angeles County.

CHAS. E. MILES,
County Recorder.
By W. B. Prichard,
Deputy.

9.30 Pd.

[Endorsed]: Filed April 25, 1888.

CHAS. H. DUNSMOOR,
Clerk.
By A. N. Hamilton,
Deputy.

(Stamped:) Land Dep't S. P. R. R. Received Jan. 22, 1884. Answered ———, 188—. Book ———, page ———.

Marked "Defendants' Exhibit Before the Special Examiner No. 14, Stephen Potter, Special Examiner."

I hereby certify that I have compared the foregoing document with the original on file in the office of the Southern Pacific Railroad Company, and find it to be a full, true and correct copy thereof, so far as

it involves the lands in suit, and omitting the descriptions of lands that are not in issue.

STEPHEN POTTER,
Special Examiner.

San Francisco, October 13th, 1893.

(On margin of page:) United States vs. S. P. R. R. Co. et al. No. 184. Filed Dec. 5, 1893. Wm. M. Van Dyke, Clerk. ————, Deputy.

Defendants' Exhibit Before the Special Examiner No. 18 in Case No. 184.

Patent No. 9, of Lands Granted by the Act of March 3, 1871, to the Southern Pacific Railroad Company, Los Angeles District, California.

The United States of America, to All to Whom These Presents Shall Come, Greeting:

Whereas, by the Act of Congress, approved July 27, 1866, and joint resolution of June 28, 1870, "to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast," and to secure to the Government the use of the same for Postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State to construct a Railroad and Telegraph Line, under certain conditions and stipulations expressed in said Act from the

City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for the granting to the said Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved sold, granted or otherwise appropriated, and free from pre-emption or other claims, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the General Land Office.

And whereas, it is further enacted by the 23d section of the act of March 3, 1871, "for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subjects to the same limitations, restrictions and conditions as were

granted to said Southern Pacific Railroad Company of California," by the aforesaid act of July 27th, 1866.

And whereas, official statements dates May 11, 1874, November 13, 1875, July 22, 1876, March 3, 1877, and January 30, 1878, from the Secretary of the Interior, have been filed in the General Land Office, showing that the commissioners appointed by the president under the provisions of the fourth section of the said act of July 27, 1866, have reported to him, that the line of said branch railroad and telegraph from the town of Mojave, in township eleven north, of range twelve west, San Bernardino base and meridian, and thence to the Fort Yuma reservation, in the southeast quarter of section twenty-six, township sixteen south, range twenty-two east same base and meridian, making three hundred and forty-six miles and ninety-six one hundredths of a mile of road has been constructed and fully completed and equipped in the manner prescribed by the said act of July 27, 1866.

And whereas, it is further shown that copies of the report of said commissioners have been filed in the Department of the Interior, with copies of the orders of the President of the United States, dated May 9, 1874, November 8, 1875, July 2, 1876, March 2, 1877, and January 23, 1878, of the completion of the above portion of said railroad and telegraph line.

And whereas, certain tracts have been selected under the act aforesaid by Jerome Madden, the duly authorized land agent of the Southern Pacific Railroad Company, as shown by his original lists of selections, dated June 27, 1877, May 14, 1883, April 7, May 17, and June 27, 1884, and certified July 2, 1877, May 25, 1883 and April 16, May 23, and July 19, 1884, by the register and receiver at Los Angeles, California. The said tracts of land lie coterminus to the constructed line of road and particularly described as follows, to wit:

* * * * * * * *

North of base line and west of San Bernardino principal meridian, California.

* * * * * * * *

TOWNSHIP SIX, RANGE TWELVE.

The southwest quarter, and the south half of the southeast quarter of section twenty-nine, containing two hundred and forty acres. All of section thirty-one, containing six hundred and forty acres.

TOWNSHIP SIX, RANGE THIRTEEN.

All of section one, containing six hundred and forty acres. All of section three, containing six hundred and forty acres. All of section seven, containing six hundred and forty acres and eighty-one hundredths of an acre. All of section eleven, con-

taining six hundred and forty acres. The south half of section fifteen, containing three hundred and twenty acres. The northwest quarter, the west half of the southwest quarter, and the east half of the southeast quarter of section seventeen, containing three hundred and twenty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-five, containing six hundred and forty acres.

TOWNSHIP SIX, RANGE FOURTEEN.

All of section one, containing six hundred and forty acres. The northeast quarter of section eleven, containing one hundred and sixty acres. The north half of section thirteen, containing three hundred and twenty acres.

TOWNSHIP SEVEN, RANGE TWELVE.

All of section fifteen, containing six hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-seven containing six hundred and forty acres. All of section thirty-one, containing six hundred and forty-two acres and forty one hundredths of an acre.

TOWNSHIP SEVEN, RANGE THIRTEEN.

All of section seven, containing six hundred and thirty-six acres. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. All

of section nineteen, containing six hundred and thirty-six acres and six one hundredths of an acre. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. All of section twenty-nine, containing six hundred and thirty-nine acres. All of section thirty-one, containing six hundred and thirty-nine acres. All of section thirty-three, containing six hundred and forty acres. All of section thirty-five, containing six hundred and forty acres.

TOWNSHIP SEVEN, RANGE FOURTEEN.

The northwest quarter, the lot numbered one of the southwest quarter, the north half of the lot numbered two of the southwest quarter, and the east half of section seven, containing six hundred acres. All of section nine, containing six hundred and forty acres. All of section eleven, containing six hundred and forty acres. All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. All of section twenty-five containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. The south half of the southwest quarter, the

northeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section thirty-three, containing one hundred and sixty acres.

TOWNSHIP SEVEN, RANGE FIFTEEN.

* * * * * * * *

The north half of section thirteen, containing three hundred and twenty acres.

* * * * * * * *

The said tracts of land as described in the foregoing make the aggregate area of (33,246.21) thirty-three thousand two hundred and forty-six acres, and twenty-one one hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting, "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute "shall not be construed to include Coal and Iron Lands."

To have and to hold the same together with all rights, privileges, immunities and appurtenances of

whatever nature thereunto belonging unto the said Southern Pacific Railroad Company of California, and to its successors and assigns forever.

In testimony whereof, I, Chester A. Arthur, President of the United States have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington this ninth day of January in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President,

CHESTER A. ARTHUR.

[Seal] M. McKEAN,

Secretary.

S. W. CLARK,

Recorder of the General Land Office.

Recorded in Vol. 8, pages 413 to 419, inclusive.

[Endorsed]: Recorded at Request of C. Cabot, Jany. 30th, 1885, at 10 min. past 3 P. M. in Book 3 of Patents, Page 489, Records Los Angeles County.

CHAS. E. MILES,

County Recorder,

By ————.

[Endorsed]: Recorded at Request of Wells, Fargo & Co. February 5th, A. D. 1885, at 35 min. Past 10

A. M. Book B of Patents, Pages 388 to 396, Inclusive.

LEGARE ALLEN,
County Recorder, San Bernardino.

[Endorsed]: Received for Record Feby. 9th, 1885, at 30 min. past 9 o'clock A. M. at Request of Wells, Fargo & Co., and Recorded in Book No. 3 of Patents, Page 234, et seq., Feb. 26th, 1885, at 3 o'clock and —— min. P. M.

S. A. McDOWELL,
County Recorder, San Diego County.
By ————,
Deputy.

$6.75.

(Stamped:) Land Dep't S. P. R. R. Received Jan. 23, 1885. Answered ——— 188 ——. Book ———, page ———.

Marked "Defendants' Exhibit before the Special Examiner No. 18, Stephen Potter, Special Examiner."

I hereby certify that I have compared the foregoing document with the original on file in the office of the Southern Pacific Railroad Company, and find it to be a full, true and correct copy thereof so far

as it involves the lands in suit, and omitting the descriptions of lands that are not in issue.

STEPHEN POTTER,
Special Examiner.

San Francisco, October 13th, 1893.

(On margin of page:) United States vs. S. P. R. R. Co et al. No. 184. Filed Dec. 5, 1893. Wm. M. Van Dyke, Clerk. ————, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

No. 184.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY,
et al.,
Defendants.

Testimony of J. A. Graves in Case No. 184.

Testimony taken on behalf of the defendants before the Standing Master and Examiner in Chancery, Hon. E. H. Lamme, at his office, in the city and county of Los Angeles, State of California, pursuant to a notice to take the same, served upon the Hon. George J. Denis, United States Attorney, and Joseph H. Call, Esq., Special United States Attorney.

Appearances and present: Joseph H. Call, Esq., Special United States Attorney, Solicitor for Complainant; Joseph D. Redding, Esq., Solicitor for Defendants; Hon. E. H. Lamme, Esq., Standing Master and Examiner in Chancery and Leo Longley, Reporter to said Examiner.

* * * * * * * *

J. A. GRAVES, called for the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. Redding.)

Q. 1. What is your name, please?

A. J. A. Graves.

Q. 2. Where do you reside?

A. Los Angeles County. I live at Alhambra, in this county.

Q. 3. Are you a resident and citizen of the Southern District of California?

A. Yes, sir; have been since 1875.

Q. 4. Are you a citizen of the United States?

A. Yes, sir.

Q. 5. Where were you born?

A. In the State of Iowa.

Q. 6. United States of America?

A. Yes, sir.

Q. 7. Are you one of the defendants in this action?

(Testimony of J. A. Graves.)

A. Yes, sir; by substitution.

Q. 8. You are one of the defendants?

A. Yes, sir.

Q. 9. Do you hold any deeds of purchase of lands involved in this suit from other purchasers from the Southern Pacific Railroad Company?

A. This is Case 184?

Q. 10. Yes.

Mr. CALL.—The question is objected to as incompetent, immaterial and irrelevant, and not the best evidence; and upon the further ground that by the terms and conditions of the Act of Congress of March 3, 1871, and the Act of July 27, 1866, the lands involved in this suit were excepted out of the grant to the Southern Pacific Railroad Company; and upon the further ground that by the terms and conditions of those Acts of Congress the grant to the Southern Pacific Railroad Company was not to take effect until a map of definite location was filed by said company; and upon the further ground that the lands in suit in this case have been forfeited and surrendered to the United States by the Act of said Southern Pacific Railroad Company, and by Act of Congress; and upon the further ground that the lands in suit in this case were granted to the Atlantic & Pacific Railroad Company by Act of Congress of July 27, 1866, and

(Testimony of J. A. Graves.)

that said company filed in the Interior Department a map of definite location of its line of route, which map of definite location has been accepted by the Secretary of the Interior of the United States as a good and sufficient map of definite location; and upon the further ground that the lands in suit herein were withdrawn and reserved by authority of the United States before any grant to the Southern Pacific Railroad Company took effect; and upon the further ground that the issues in this case have been finally decided by the Supreme Court of the United States and by the United States Circuit Court for the Southern District of California, as shown by the records and decisions of those cases in evidence herein.

A. Yes, sir. Do you want to offer these in evidence?

Mr. REDDING.—Yes, sir. Just introduce them.

Mr. GRAVES.—I offer in evidence deed from the Southern Pacific Railroad Company to the Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, for five thousand and some acres of patented lands, patented prior to the issuance of the deed described as follows, said deed being numbered 4719:

"The southwest quarter (SW. ¼) of section seventeen (17). All of fractional section nineteen (19).

(Testimony of J. A. Graves.)

All of section twenty-one (21). All of section twenty-seven (27) in township five (5) north of range ten (10) west; the southwest quarter (SW. ¼) of section three (3). All of fractional section five (5). All of section nine (9). West half (W. ½) of section eleven (11) in township five (5) north of range eleven (11) west. All of fractional section one (1) in township five (5) north of range twelve (12) west, and west half (W. ½) of section No. thirty-three (33) in township six (6) north of range eleven (11) west, all in San Bernardino base and meridian, containing five thousand and eighteen (5018.78) .78 acres, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging; reserving all claim of the United States to the same as mineral land.''

Mr. CALL.—Same objections.

(Document last offered marked Defendants' Exhibit No. 44, before E. H. Lamme, Examiner.)

Mr. REDDING.—Mr. Call, in reference to the introduction of these deeds and contracts, are you willing that certified copies of the same may be introduced in lieu of the originals?

Mr. CALL.—Yes, I have no objections, upon the Examiner comparing them and certifying to their be-

(Testimony of J. A. Graves.)

ing copies; the copies may be introduced in lieu of the originals; subject to the same objections.

Mr. REDDING.—Then I understand you are now introducing the originals by showing them?

Mr. GRAVES.—Yes, sir.

Mr. REDDING.—And then leaving the certified copies, to be certified with the Examiner?

Mr. GRAVES.—Yes, sir.

Mr. REDDING.—Proceed with the enumeration and introduction of the exhibits.

Mr. GRAVES.—Also Contract No. 4720, for the following described lands:

"All of fractional sections three (3), five (5), and seven (7). All of section nine (9), north half (N. ½), and southeast quarter (S.E.¼) of section seventeen (17) in township five (5) north of range ten (10) west. All of fractional section one (Frac'l 1), fractional north half (Frac'l N. ½), southeast quarter (S.E.¼) of section three (3), east half (E. ½) of section eleven (11) in township five (5), north of range eleven (11) west. All of sec. twenty-nine (29). All of fractional section thirty-one (frac'l 31), and all of section thirty-three (33) in township six (6), north of range ten (10) west. All of sections thirteen (13), fifteen (15), twenty-one (21), twenty-

(Testimony of J. A. Graves.)

three (23), twenty-five (25), twenty-seven (27), east half (E.½) of thirty-three (33), and all of thirty-five (35), in township six (6), north of range eleven (11) west, all of San Bernardino Base and Meridian, containing eleven thousand two hundred and fifty-eight 36/100 (11,258.36/100) 36/100 acres."

Mr. CALL.—Same objections.

(Document last offered marked Defendants' Exhibit No. 45, before E. H. Lamme, Examiner.)

Mr. GRAVES.—Also Contract No. 4721, for the following described lands:

"All of fractional sections one (1), three (3), and five (5), all of sections nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), twenty-one (21), twenty-three (23), twenty-seven (27), and thirty-three (33), in township six (6), north of range twelve (12) west, all of San Bernardino Base and Meridian, containing seventy-six hundred and sixty-eight (7668.27/100) 27/100 acres."

Mr. CALL.—Same objections.

(Document last offered marked Defendants' Exhibit No. 46, before E. H. Lamme, Examiner.)

Mr. GRAVES.—Also Contract No. 4,722, for the following described lands:

"All of fractional section seven (frac'l 7) in township eight (8), north of range fourteen (14) west.

(Testimony of J. A. Graves.)

All of section five (5). All of fractional section seven (frac'l 7). All of sections nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17). All of fractional nineteen (frac'l 19). All of twenty-one (21), twenty-nine (29), and all of fractional thirty-one (frac'l 31) in township eight (8), north of range fifteen (15) west. All of fractional section thirty-one (frac'l 31) in township nine (9) north of range fifteen (15) west; all of San Bernardino Base and Meridian, containing eighty-two hundred and seventy-three (8,273.34/100) 34/100 acres.

Mr. CALL.—Same objections.

(Documents last offered marked "Defendants' Exhibit No. 47, before E. H. Lamme, Examiner.)

Mr. GRAVES.—Also Contract No. 4,723, for the following described lands:

"All of fractional sections five (5) and seven (7). All of sections nine (9) and seventeen (17), fractional section nineteen (19). All of sections twenty-one (21), and twenty-nine (29), fractional section thirty-one (31). All of section thirty-three (33), in township seven (7) north, range eleven (11) west. All of fractional sections one (1) and three (3), southwest quarter of northeast quarter (S.W. ¼ of N.E. ¼), west half of southeast quarter (W. ½ of S.E. ¼) and west half (W. ½) of section eleven (11).

(Testimony of J. A. Graves.)

All of section thirteen (13), fractional section nineteen (19). All of sections twenty-three (23), twenty-five (25), twenty-nine (29), thirty-three (33), and thirty-five (35), in township seven (7) north, range twelve (12) west. All of section twenty-five (25) in township seven (7) north, range thirteen (13) west. All of fractional sections five (5) and seven (7) in township eight (8) north, range ten (10) west. All of section eleven (11), fractional section nineteen (19). All of section twenty-nine (29), fractional section thirty-one (31), in township eight (8) north, range eleven (11) west. All of sections twenty-five (25), and thirty-five (35), in township eight (8) north, range twelve (12) west; all of San Bernardino Base and Meridian, containing seventeen thousand seven hundred and sixty-eight (17,768.41/100) 41/100 acres."

Mr. CALL.—Same objections.

(Document last offered marked Defendants' Exhibit No. 48, before E. H. Lamme, Examiner.)

Mr. GRAVES.—All of those contracts being from the Southern Pacific Railroad Company to the Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited. Then I also offer a deed from the Atlantic and Pacific Fibre Importing and Manufacturing Company, to myself, covering all of the

(Testimony of J. A. Graves.)

land described in the former exhibits, which you will see is also—it is an assignment of all of these contracts, besides being a deed of the lands.

(Document last offered marked Defendants' Exhibit No. 49, before E. H. Lamme, Examiner.)

Q. 11. (By Mr. REDDING.) Did you purchase those lands in good faith? A. Yes, sir.

Q. 12. For value received? A. Yes, sir.

Q. 13. As stated in the deed? A. Yes, sir.

Q. 14. Are you at present holding said lands under the said deeds? A. Yes.

Q. 15. Are you in possession of the same?

A. Well, we are exercising possession; we are keeping other people off of them. Not farming them, but—yes, we are in possession.

Q. 16. Have you paid all the State, county and municipal taxes and assessments legally levied and assessed upon said lands since the said deed?

A. Well, I have paid some, and there are others that were assessed this year that were canceled by the order of the District Attorney, holding that they were non-assessable lands. I was ready to pay them provided they were held to be legal.

Q. 17. Then you have paid—

A. All legally assessed taxes, yes, sir.

Q. 18. And assessments? A. Yes, sir.

(Testimony of J. A. Graves.)

Q. 19. Did you buy these lands in good faith?

A. Yes, expecting to make title to them.

Q. 20. And do you hold them as said purchaser, and as a citizen of the United States? A. I do.

Q. 21. And as an innocent purchaser?

A. Well—

Q. 22. For value received?

A. I hold them for a valuable consideration.

Q. 23. Well, do you claim to be an innocent purchaser of said lands, under the Act of Congress of March 3, 1887?

A. I think I am protected under the Act of Congress of 1887. I would like to understand this "innocent"—what you mean by that. Of course, I have notice of the defect—I have notice of the Congressional action taken, and of the pendency of this suit; had it when I bought. Outside of that I consider myself an innocent purchaser. Of course, I had that notice of that suit. There is no use denying that. At the same time, I understand—I think I understand, the Act of Congress of 1887, and I think I am protected under it.

Mr. REDDING.—That is all.

(Testimony of J. A. Graves.)

Cross-examination.

(By Mr. CALL.)

Q. 24. How much did you pay the Atlantic and Pacific Fibre Importing and Manufacturing Company for these lands?

A. I have not paid them anything in coin. But I have agreements with them which are the equivalent of coin.

Q. 25. What is the nature of the agreements?

A. I am to protect them in the title, that is, protect them in their original purchase money; make what I can out of it over and above that.

Q. 26. And devote your legal services to that end?

A. Yes. They have to have somebody on this end.

Mr. CALL.—That is all.

Adjourned until December 20th, 1893, at 10 o'clock A. M., to meet by consent of counsel at the Main Street Bank and Trust Company's office, in the City of Los Angeles.

Case No. 184.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

The Southern Pacific Railroad Company and D. O. Mills, and Garrit L. Lansing, Trustees; the City Brick Company; Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited; Julius Abrahamson, Hugo Abrahamson, Mrs. Jesus Ord de Andrade, Mrs. Thomas Allison, Mrs. Mary Backman, Mrs. Matilda L. Barber, Henry A. Barclay, E. T. Barber, Thomas N. Beck, A. N. Benham, Jesse Martin Blanchard, E. H. Blood, Ira H. Bradshaw, B. B. Briggs, Philomela T. Bunell, Frederick H. Busby, A. W. Butler, H. A. Bond, William H. Carlson, William H. Carlson, V. E. Carson, B. F. Carter, Benjamin F. Carter, Harry Chandler, Fred Chandler, Walter S. Chaffee, J. N. Chapman, F. O. Christensen, Mrs. L. C. Chormicle, Byron O. Clark, George Claussen, Clarence T. Cleve, Nicholas Cochems, Nathan Cole, Jr., Peter

Cook, I. D. Cory, Seaton T. Cull, Stefano Cuneo, J. A. Dahl, Andrew J. Darling, Thomas A. Delano, Richard Dillon, John Ditter, David Dolbeen, John F. Duehren, James F. Dunsmoor, Edward G. Durant, Robert Dunn, Henry Elms, Fairmont Land and Water Company, Farming and Fruit Land Company, George W. Fentrees, S. W. Ferguson, William Ferguson, William Freeman, Joseph W. Furnival, J. Garber, F. C. Garbutt, J. Drew Gay, F. A. Geier, Ambrose F. George, Will D. Gould, Mrs. Mary L. Gould, Thomas E. Gould, James Greton, W. F. Grosser, D. J. Haines, Herman Haines, James M. Hait, Simeon Hamberg, Jacob Harpe, Alice A. Hall, Calvin Hartwell, William T. Hamilton, William T. Hamiton, James Hamilton, Peter Hamilton, John C. Haskell, John C. Hay, Mary Jackson Hall, Julius Heyman, J. M. Hill, John D. Hoffman, August Hoelling, J. F. Holbrook, W. R. Hughes, George A. Hunter, J. F. Houghton, E. J. Ismert, W. W. Jenkins, Thomas J. Jahannsen, M. D. Johnson, John J. Jones, A. S. Joseph, John Kenealey, Frederick Kenworthy, Richard Kichline, Joseph Kurtz, Charles Kutschmar, Mrs. Ammoretta J. Lanterman, T. B. Lawhead, L. B. Lawson, Lawson M. La Fetra, Stephen L. Leighton,

John Robarts and George L. Mesnager, Executors of the Last Will and Testament of Miguel Leonis, deceased, George Loomis, George Loomis, Marion L. Loop, Pablo Lopez, Daniel Luce, G. W. Mack, John B. Martin, Cora L. Mathiason, Ezra May, Angus S. McDonald, A. M. Melrose, Mrs. Flossy Melrose, W. E. McVay, Thomas Mensies, J. G. Miller, John Million, Mrs. Mamie O. Million, H. H. Mize, Thomas F. Mitchell, W. H. Mosely, L. E. Mosher, Joseph Mullally, Andrew Myers, D. C. Newcomb, Albert E. Nettleton, North Pasadena Land and Water Company, James O'Reilly, George L. Ott, Pacific Coast Oil Company, J. H. Painter, M. D. Painter, Mrs. Annie Palen, J. R. Pallett, W. A. Pallett, T. A. Pallett, C. O. Parsons, F. W. Pattee, James Peirano, John J. Peckham, Ramon Perea, Daniel Phelan, Edward E. Perley, McH. Pierce, William Pisch, R. M. Pogson, A. W. Potts, Lafayette S. Porter, A. J. Praster, F. H. Prescott, Lewis H. Price, Charles Raggis, W. B. Ralphs, James B. Randol, C. P. Randolph, F. M. Randolph, Francisco Real, George H. Reed, John Rea, Otto Rinderknecht, Felipe Rivera, James Robertson, George D. Rowan, S. D. Savage, Jacob Scherer, George W. Seifert,

Luciano Sequois, Henry C. Shearman, Henrietta Shirpser, Rebecca Jetta Shirpser, David Shirpser, Max Shirpser, Gianbatista Sinaco, J. S. Slauson, J. Wallen Smith, Mrs. Maggie Smith, E. Sommer, W. A. Spencer, H. G. Stevenson, H. J. Stevenson, M. W. Stimson, Robert Strathearn, R. P. Strathern, Eleanor Sussman, D. M. Sutherland, John Sweeney, W. H. Taggart, James P. Taylor, Mary G. Tongier, James R. Townsend, Mrs. C. L. True, L. Tunison, J. S. Turner, George S. Umpleby, F. Veysset, George Vilas, Alden R. Vining, Daniel A. Wagner, S. A. Waldron, W. W. Wallace, C. H. Watts, Mrs. Julia J. Wheeler, A. C. Whitacre, M. L. Wicks, Moye Wicks, Mrs. Jennie L. Wicks, Mary C. Williams, C. N. Wilson, Robert N. C. Wilson, J. Youngblood, and Jackson A. Graves,

Defendants.

Decree in Equity Filed July 19, 1984, in Case No. 184.

This cause having been regularly set for to-day was on this 25th day of June, 1894, duly heard, in open Court.

The plaintiff appeared by Mr. George J. Denis, United States Attorney, and Mr. Joseph H. Call Special Attorney. The defendants appeared by Mr. William F. Herrin, Mr. L. E. Payson and Mr. Joseph D. Redding, their solicitors. Mr. D. L. Russell and

Mr. Horace Bell also appeared, as solicitors for the Executors of the Estate of Miguel Leonis, deceased, Defendants.

The testimony having been taken, and all the evidence introduced, and the cause having been duly argued and submitted, it is by the Court now—

Ordered, adjudged and decreed, that the United States of America is the owner, by title in fee simple absolute, of all the sections of land designated by odd numbers, in township three (3) and four (4) north, ranges five (5), six (6), and seven (7) west; township one (1) north, ranges sixteen (16), seventeen (17) and eighteen (18) west; township six (6) and south three-fourths of township seven (7) north, ranges eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteenn (18), and nineteen (19) west. Also all of the sections of land designated by odd numbers, as shown by the public surveys, embraced within the townships from number two (2), north, to number five (5) north, both numbers included, and ranges from number eight (8) west to number eighteen (18) west, both numbers included, (except sections twenty-three (23) and thirty-five (35) in township four (4) north, range fifteen (15) west, and except sections one (1), eleven (11), and thirteen (13) in townships three (3) north, range fifteen (15) west); also the unsurveyed lands within said area which will be designated as

odd-numbered sections when the public surveys of the United States shall have been extended over such townships. All the lands are herein described as of San Bernardino Base and Meridian, and are situated in the State of California.

And the defendants are, and each of them is, forever enjoined and restrained from chopping upon or carrying from the said lands any trees, timber or wood, and from claiming or asserting any right, title or interest in or to the said lands or any thereof.

It is further ordered, adjudged and decreed, that each and every patent heretofore issued by the United States to the Southern Pacific Railroad Company in pursuance of the act of Congress approved July 27, 1866 (14 Stats. 292), and the act entitled "An act to incorporate the Texas & Pacific Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, (16 Stats. 573), and either of said acts, and all acts amendatory and supplemental to either thereof, purporting to convey any of the lands hereinbefore described, to said Southern Pacific Railroad Company, is null, void and vacated.

It is further ordered, adjudged, and decreed that each and every patent which has heretofore issued by the United States to the defendants or to any of them, in pursuance of the pre-emption, homestead, or any other general land law of Congress, is excepted from

and in no wise affected by the provisions of this decree; nor shall this decree in any wise affect any right which the defendants or any of them other than the said Southern Pacific Railroad Company now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture or unearned lands, and for other purposes," approved March 3, 1887; nor shall this decree in any wise affect any right which the United States may have to hereafter recover from said Southern Pacific Railroad Company the ordinary Government price for any of said lands patented to said company which the Secretary of the Interior may determine have been sold by said company to either or any of the defendants herein in good faith, and which may be patented to such bona fide purchasers in pursuance of said act of March 3, 1887, if any such there be; nor shall this decree in any wise affect any right, title or interest which the defendant Southern Pacific Railroad Company now has or may hereafter acquire to any right of way for one hundred feet in width on each side of the main track of its road, to station buildings, workshops, depots, machine-shops, switches, side-tracks, turntables, water stations, and all grounds necessary for the same.

And it is further ordered, adjudged and decreed that the plaintiff have and recover its costs of this suit taxed at 1924 05/100 dollars.

Done and signed this 19th day of July, 1894.

ROSS,
Dist. Judge.

Decree entered and recorded July 19th, 1894.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 184. U. S. Circuit Court, Ninth Circuit, Southern District of California. The United States of America vs. The Southern Pacific Railroad Company, et al. Final Decree. Filed Jul. 19, 1894. Wm. M. Van Dyke, Clerk.

Mandate of Supreme Court U. S. Filed January 7, 1898, in Case No. 184.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the Circuit [Seal] Court of the United States, for the Southern District of California, Greeting:

Whereas, lately, in the United States Circuit Court of Appeals, for the Ninth Circuit, in a cause between the Southern Pacific Railroad Company, et al., appellants, and the United States, appellee, wherein the decree of the said United States Circuit Court of Ap-

peals, entered in said cause on the 24th day of June, A. D. 1895, is in the following words, viz.:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Southern District of California, and was argued by counsel. On consideration whereof, It is now ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed," as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And, whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this Court, that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed in all respects as to the Southern Pacific Railroad Company as well as to the trustees in the mortgage executed by that company, and also as to the other defendants, subject, however, to the right of the United States to

proceed in the Circuit Court to a final decree as to those defendants.

And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court of the United States, for the Southern District of California:

October 18, 1897.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed]: No. 184. Supreme Court of the United States. No. 71. October Term, 1897. The Southern Pacific R. R. Co. et al., vs. The United States. Mandate. Filed Jan. 7, 1898. Wm. M. Van Dyke, Clerk.

Case No. 184.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

The Southern Pacific Railroad Company and D. O. Mills, and Garrit L. Lansing, Trustees; the City Brick Company; Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited; Julius Abrahamson, Hugo Abrahamson, Mrs. Jesus Ord de Andrade, Mrs. Thomas Allison, Mrs. Mary Backman, Mrs. Matilda L. Barber, Henry A. Barclay, E. T. Barber, Thomas N. Beck, A. N. Benham, Jesse Martin Blanchard, E. H. Blood, Ira H. Bradshaw, B. B. Briggs, Philomela T. Bunell, Frederick H. Busby, A. W. Butler, H. A. Bond, William H. Carlson, William H. Carlson, V. E. Carson, B. F. Carter, Benjamin F. Carter, Harry Chandler, Fred Chandler, Walter S. Chaffee, J. N. Chapman, F. O. Christensen, Mrs. L. C. Chormicle, Byron O. Clark, George Claussen, Clarence T. Cleve,

Nicholas Cochems, Nathan Cole, Jr., Peter Cook, I. D. Cory, Seaton T. Cull, Stefano Cuneo, J. A. Dahl, Andrew J. Darling, Thomas A. Delano, Richard Dillon, John Ditter, David Dolbeen, John F. Duehren, James F. Dunsmoor, Edward G. Durant, Robert Dunn, Henry Elms, Fairmont Land and Water Company, Farming and Fruit Land Company, George W. Fentrees, S. W. Ferguson, William Ferguson, William Freeman, Joseph W. Furnival, J. Garber, F. C. Garbutt, J. Drew Gay, F. A. Geier, Ambrose F. George, Will D. Gould, Mrs. Mary L. Gould, Thomas E. Gould, James Greton, W. F. Grosser, D. J. Haines, Herman Haines, James M. Hait, Simeon Hamberg, Jacob Harpe, Alice A. Hall, Calvin Hartwell, William T. Hamilton, William T. Hamiton, James Hamilton, Peter Hamilton, John C. Haskell, John C. Hay, Mary Jackson Hall, Julius Heyman, J. M. Hill, John D. Hoffman, August Hoelling, J. F. Holbrook, W. R. Hughes, George A. Hunter, J. F. Houghton, E. J. Ismert, W. W. Jenkins, Thomas J. Johannsen, M. D. Johnson, John J. Jones, A. S. Joseph, John Kenealey, Frederick Kenworthy, Richard Kichline, Joseph Kurtz, Charles Kutschmar, Mrs. Ammoretta J. Lanterman, T. B. Lawhead, L. B. Lawson,

Lawson M. La Fetra, Stephen L. Leighton, John Robarts and George L. Mesnager, Executors of the Last Will and Testament of Miguel Leonis, deceased, George Loomis, George Loomis, Marion C. Loop, Pablo Lopez, Daniel Luce, G. W. Mack, John B. Martin, Cora L. Mathiason, Ezra May, Angus S. McDonald, A. M. Melrose, Mrs. Flossy Melrose, W. E. McVay, Thomas Mensies, J. G. Miller, John Million, Mrs. Mamie O. Million, H. H. Mize, Thomas F. Mitchell, W. H. Mosely, L. E. Mosher, Joseph Mullally, Andrew Myers, D. C. Newcomb, Albert E. Nettleton, North Pasadena Land and Water Company, James O'Reilly, George L. Ott, Pacific Coast Oil Company, J. H. Painter, Mrs. Annie Palen, J. R. Pallett, W. A. Pallett, T. A. Pallett, C. O. Parsons, F. W. Pattee, James Peirano, John J. Peckham, Ramon Perea, Daniel Phelan, Edward E. Perley, McH. Pierce, William Pisch, R. M. Pogson, A. W. Potts, Lafayette S. Porter, A. J. Praster, F. H. Prescott, Lewis H. Price, Charles Raggis, W. B. Ralphs, James B. Randol, C. P. Randolph, F. M. Randolph, Francisco Real, George H. Reed, John Rea, Otto Rinderknecht, Felipe Rivera, James Robertson, George D. Rowan, S. D. Savage, Jacob Scherer, George W. Seifert,

Luciano Sequois, Henry C. Shearman, Henrietta Shirpser, Rebecca Jetta Shirpser, David Shirpser, Max Shirpser, Gianbatista Sinaco, J. S. Slauson, J. Wallen Smith, Mrs. Maggie Smith, E. Sommer, W. A. Spencer, H. G. Stevenson, H. J. Stevenson, M. W. Stimson, Robert Strathearn, R. P. Strathern, Eleanor Sussman, D. M. Sutherland, John Sweeney, W. H. Taggart, James P. Taylor, Mary G. Tongier, James R. Townsend, Mrs. C. L. True, L. Tunison, J. S. Turner, George S. Umpleby, F. Veysset, George Vilas, Alden R. Vining, Daniel Wagner, S. A. Waldron, W. W. Wallace, C. H. Watts, Mrs. Julia J. Wheeler, A. C. Whitacre, M. L. Wicks, Moye Wicks, Mrs. Jennie L. Wicks, Mary C. Williams, C. N. Wilson, Robert N. C. Wilson, J. Youngblood, and Jackson A. Graves,

Defendants.

Decree Filed August 5, 1988, Pursuant to Mandate of Supreme Court U. S. in Case No. 184.

This cause coming on further to be heard in open court this 5th day of August, A. D. 1898, in pursuance of a mandate of the Supreme Court of the United States, filed herein on January 7th, A. D. 1898, by which mandate it was adjudged that the decree of this Court passed and entered on the 19th day of July, A. D. 1894, "be and the same is hereby affirmed in all

respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that Company, and affirmed also as to the other defendants, subject, however, to the right of the United States to proceed in the Circuit Court to a final decree as to those defendants."

And whereas, on said January 7, 1898, upon motion of Mr. Joseph H. Call, Special Assistant United States Attorney, further proceedings in this cause against the defendants other than defendants Southern Pacific Railroad Company, and D. O. Mills, and G. L. Lansing, Trustees, were dismissed without prejudice as to certain tracts of land, and at the same time the United States by their said attorney moved for a further decree against the defendants other than said defendants Southern Pacific Railroad Company, and D. O. Mills and Garrett L. Lansing, as to the balance of the lands described in the bill of complaint and the matter of said motion having come on to be heard and Mr. William F. Herrin and Mr. William Singer, Jr., having appeared as counsel for the defendants, and Mr. Joseph H. Call, having appeared as counsel for the United States, and the matter having been argued and submitted to the Court, and the Court being duly advised in the premises, doth now order, adjudge and decree as to the rights and interests of defendants others

than Southern Pacific Railroad Company and D. O. Mills, and Garret L. Lansing, trustees, as follows:

First. That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant George Loomis, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.,

That defendant George Lomis, is now, and was on March 3, 1887, a citizen of the United States and that he is a bona fide purchaser of said land from and under defendant, the Southern Pacific Railroad Company, within the meaning of section 5, of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1887, said land being described as follows, to wit:

N. E., ¼ of N. E., ¼, S. ½ of N. E., ¼ N. W., ¼ of N. W. ¼, S. ½ of N W, ¼ and S. ½ of Sec. 15, Tp., 3 N, R., 16 W.

S. ½ of N. E., ¼ and frac. S. ½ of N. W. ¼ of Sec. 7, Tp. 3 N., R. 15 W.

S. E. ¼ of Sec. 7, Tp. 3 N., R. 15 W.

Frac. S. W. ¼ of Sec. 7, Tp. 3 N., R. 15 W.
N. W. ¼ of Sec. 7, Tp. 3 N., R. 16, W.
N. W. ¼ of Sec. 7, Tp. 3 N., R. 16 W.
S. E. ¼ of Sec. 7, Tp. 3 N., R. 16, W.
S. W. ¼, of Sec. 7, Tp. 3 N., R. 16 W.
W. ½ of S. W. ¼ of Sec. 9, Tp. 3 N., R. 16 W.
Lots 1, 2, 3 and 4 of Sec. 17, Tp. 3 N., R. 16 W.
N. E. ¼ of S. E. ¼ of Sec. 21, Tp., 3 N., R. 16 W.
Frac. N. E. ¼ of Sec. 1, Tp., 3 N., R. 17 W.
Frac. N. W. ¼ of Sec. 1, Tp. 3 N., R. 17 W.
S. E. ¼ of Sec. 1, Tp. 3 N., R. 17 W.
S. W. ¼ of Sec. 1, Tp. 3 N., R. 17 W.

Second: That the United States are the owners by title in fee simple absolute of the following described land, subject to right of the defendant the Pacific Coast Oil Company, its heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Pacific Coast Oil Company is now and was on March 3, 1887, a citizen of the United States and that it is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of sec. 5, of the act of Congress, approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said

defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1887, said land being described as follows, to wit:

N. E., ¼ of N. W. ¼ and Lots 1, 2, 3, and 4 of Sec. 19, Tp. 3 N., R. 15 W.

Third: That the United States are the owners by title in fee simple absolute of the following described lands, subject to the right of defendant Jackson A. Graves, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Jackson A. Graves, is now and was on March 3, 1887, a citizen of the United States and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5, of the act of Congress, approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1887, said land being described as follows, to wit:

All of frac. sections 3, 5 and 7; all of section 9, N. ½ and S. E. ¼ of sec. 17; Tp. 5 N., R. 10 W. All of frac. section 1; frac. N. ½ and S. E. ¼ of sec. 3; E. ½ of sec. 11, Tp. 5 N., R. 11 W. All of sections 13, 15, 21, 23, 25 and 27; E. ½ of section 33; all of sec. 35; Tp. 6 N., R. 11 W.

All of frac. sections 1, 3, 5 and all of sections 9, 11, 13, 15, 17, 21, 23, 27 and 33, Tp. 6 N., R. 12 W.

S. ½ of sec. 9; all of sections 17, 19, 21 and 29; frac. sec. 31, and all of sections 33, Tp. 7 N., R. 11 W. W. ½ of SE. ¼ and SW. ¼ of sec. 11; all of sec. 13, frac. sec. 19; all of sections 23, 25, 29, 33 and 35, Tp. 7 N., R. 12 W. All of sec. 25, Tp., 7 N., R. 13 W.

Fourth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant Mrs. Mary L. Gould, her heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Mrs. Mary L. Gould, is now, and was on March 3, 1887, a citizen of the United States, and that she is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5, of the act of Congress, approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands

and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1897; said land being described as follows, to wit:

N. W., ¼ of sec. 31, Tp. 2 N., R. 12 W.

Fifth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant M. W. Stimson, his heirs, executors, or assigns to purchase said land upon certain terms and conditions viz.:

That defendant, M. W. Stimson, is now, and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant, the Southern Pacific Railroad Company, within the meaning of section 5, of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5 of

said act of Congress of March 3, 1887, said land being described as follows, to wit:

N. E. ¼ of sec. 35, Tp. 7 N., R. 14 W.

S. E. ¼ of sec. 35, Tp. 7 N., R. 14 W.

Sixth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the rights of defendant Charles M. Stimson, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Charles M. Stimson, is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5, of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5 of said act of Congress of March 3, 1887; said land being described as follows, to wit:

N. W. ¼ of sec. 35, Tp. 7 N., R. 14 W.

Seventh: That the United States are the owners by title in fee simple absolute of the following de-

scribed land, subject to the right of defendant Daniel D. Brunk, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Daniel D. Brunk, is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company, within the meaning of section 5 of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1887, said land being described as follows, to wit:

W. ½ of N. E. ¼ of sec. 31, Tp. 2, N., R. 12 W.

Eighth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant Stefano Cuneo, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Stefano Cuneo, is now and was on March 3, 1887, a citizen of the United States and that he is a bona fide purchaser of said land from

and under defendant the Southern Pacific Railroad Company within the meaning of section 5, of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5, of said act of Congress of March 3, 1887; said land being described as follows, to wit:

All of frac. sec. 33, Tp. 4 N., R. 15 W.

Ninth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant Gianbatista Suraco, otherwise known as Gianbatista Sinaco, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Gianbatista Suraco is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5, of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and

for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5 of said act of Congress of March 3, 1887, said land being described as follows, to wit:

All of sec. 29, Tp. 4 N., R. 15 W.

Tenth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant William H. Carlson, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant William H. Carlson, is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company, within the meaning of section 5 of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for whch lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5 of said act of Congress of March 3, 1887, said land being described as follows, to wit:

All of frac. sec. 19, Tp., 4 N., R. 15 W.

N. E. ¼ of N. E. ¼ of lots 1, 2, 3, 4 and 5, of sec. 13, Tp. 4 N., R. 16 W.

Eleventh: That the United States are the owners by title in fee simple absolute of the following described land subject to the right of defendant Thomas F. Mitchell, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Thomas F. Mitchell, is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5 of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto upon complying with the provisions of section 5 of said act of Congress of March 3, 1887, said land being described as follows, to wit:

Frac. E. ½ of sec. 3, Tp. 4 N., R. 14 W.

Twelfth: That the United States are the owners by title in fee simple absolute of the following described land, subject to the right of defendant

Ramon Perea, his heirs, executors or assigns, to purchase said land upon certain terms and conditions, viz.:

That defendant Ramon Perea, is now and was on March 3, 1887, a citizen of the United States, and that he is a bona fide purchaser of said land from and under defendant the Southern Pacific Railroad Company within the meaning of section 5 of the act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," for which lands said defendant is entitled to make payment to the United States and secure a patent from the United States thereto, upon complying with the provisions of section 5 of said act of Congress of March 3, 1887, said land being described as follows, to wit:

All of sec. 27, Tp. 5 N., R. 16 W.

Thirteenth: That defendant, Jackson A. Graves, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands, within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes,"

said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendant having purchased said land from and under said company in good faith, the title of said defendant, and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

S. W. ¼ of sec. 17; all of frac. sec. 19; all of sec. 21; all of sec. 27, Tp. 5 N., R. 10 W. S. W. ¼ of sec. 3; all of frac. sec. 5; all of sec. 9; W. ½ of sec. 11; Tp. 5 N. R. 11, W. All of frac. sec. 1, Tp. 5 N., R. 12 W. W. ½ of sec. 33, Tp. 6 N., R. 11 W.

Fourteenth: That defendant D. M. Sutherland, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands, within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes," said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said land from and under said company in good faith the title of said defendant and of his heirs, grantees and as-

signs to said lands is hereby confirmed, said lands being described as follows, to wit:

S. E. ¼ of sec. 27, Tp. 5 N., R. 9 W.

W. ½ of N.E. ¼ of sec. 29, Tp. 5 N. R., 10 W.

Fifteenth: That defendant Clarence T. Cleve is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendant having purchased said land from and under said company in good faith, the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

NW. ¼ of sec. 15, Tp. 5 N., R. 11 W.

Sixteenth: That defendants, Peter Hamilton and Mrs. Thomas Allison, are bona fide purchasers from and under defendant the Southern Pacific Railroad Company of the following described lands, within

the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said lands having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendants having purchased said land from and under said company in good faith, the title of said defendants, and of their heirs, grantees and assigns, to said lands, is hereby confirmed, said lands being described as follows, to wit:

All of sec. 35, Tp. 7 N., R. 13 W.

Seventeenth: That defendants William Ferguson and James Hamilton are bona fide purchasers from and under defendant the Southern Pacific Railroad Company of the following described lands, within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendants having purchased said land from and under said company in good faith, the title of said defendants and of their heirs, grantees and assigns to

said lands is hereby confirmed; said lands being described as follows, to wit:

All of sec. 27, Tp. 7 N., R. 13 W.

Eighteenth: That said defendant, Ira H. Bradshaw, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said lands having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendant having purchased said land from and under said company in good faith, the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

N. E. ¼ of sec. 15, Tp. 5 N., R. 11 W.

Nineteenth: That said defendants, Peter Cook, M. L. Wicks, and Alexander Cook, are bona fide purchasers from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled,

"An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said lands having been erroneously patented by the United States to said Southern Pacific Railroad Company; and said defendants and of their heirs, grantees and assigns under said company in good faith the title of said defendants and of their heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

Sec. 1, Tp. 6 N., R. 13 W.

Twentieth: That defendant, Mary L. Gould, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said land from and under said company in good faith, the title of said defendant and of her heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

Lot 2 in S. W. ¼; E. ½ of S. W. ¼ and W. ½ of S. E. ¼ of sec. 31, Tp. 2 N., R. 12 W.

W. ½ of S. E. ¼ of sec. 25, Tp. 2 N., R. 13 W.

E. ½ of S. E. ¼ of sec. 25, Tp. 2 N., R. 13 W.

Twenty-first: That defendant, Will D. Gould, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes," said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said land from and under said company in good faith the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

N. E. ¼ of sec. 25, Tp. 2 N., R. 13 W.

N. W. ¼ of sec. 25, Tp. 2 N., R. 13 W.

Twenty-second: That defendant, James M. Hait, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March

2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said land from and under said company in good faith the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

E. ½ of S. E. ¼ of sec. 31, Tp. 2 N., R. 12 W.

Twenty-third: That defendants, Richard Dillon and John Kenealy are bona fide purchasers from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes," said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendants having purchased said land from and under such company in good faith the title of said defendants and of their heirs, grantees and assigns to said lands is hereby confirmed, said lands being described as follows, to wit:

Lots 3 and 4 and S. ½ of S. W. ¼ of sec. 21, Tp. 2 N., R. 14 W.

Twenty-fourth: That defendants, J. Garber and McH. Pierce are bona fide purchasers from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4, of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 5, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendants having purchased said land from and under said company in good faith the title of said defendants and of their heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

W. ½ of S. W. ¼ of sec. 25, Tp. 5 N., R. 13 W.

Twenty-fifth: That defendant, Nathan Cole, Jr., is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to

vacate and annul patents and for other purposes''; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said land from and under said company in good faith the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

N. ½ of sec. 13, Tp. 5 N., R. 11 W.

Twenty-sixth: That defendant, Jacob Harps, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled ''An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes''; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendant having purchased said land from and under said Company in good faith the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

Frac. S. W. ¼ of Sec. 21, Tp. 3 N., R. 15 W.

Twenty-seventh: That defendants, A. W. Potts and J. F. Holbrook, are bona fide purchasers from

and under defendant the Southern Pacific Railroad Company, of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendants having purchased said land from and under said company in good faith the title of said defendants and of their heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

W. ½ of N. W. ¼ of Sec. 17, Tp. 2 N., R. 13 W.

Twenty-eighth: That defendant, Pablo Lopez, is a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following-described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendant having purchased said

land from and under said Company in good faith the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed; said lands being described as follows, to wit:

Lots 1, 2, 5 and 6, of Sec. 1, Tp. 2 N., R. 15 W.

Twenty-ninth: That defendant, Jesse Martin Blanchard is a bona fide purchaser from and under defendant, the Southern Pacific Railroad Company, of the following-described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to the Southern Pacific Railroad Company and said defendant having purchased said land from and under said Company in good faith the title of said defendant and of his heirs, grantees and assigns is hereby confirmed; said lands being described as follows, to wit:

Frac. S. W. ¼ of Sec. 17, Tp. 2 N., R. 13 W.

Thirtieth: That defendant Richard Dillon is a bona fide purchaser from and under defendant, the Southern Pacific Railroad Company of the following described lands, within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896,

entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes"; said land having been erroneously patented by the United States to the said Southern Pacific Railroad Company, and said defendant having purchased said land from and under said company in good faith; the title of said defendant and of his heirs, grantees and assigns to said lands is hereby confirmed, said lands being described as follows, to wit:

E. ½ of N. E. ¼ of Lots 1 and 2 in N. E. ¼ of Sec. 29, Tp. 2 N., R. 14 W.

Thirty-first: The defendants, Harry Chandler and Fred Chandler are bona fide purchasers from and under defendant, the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to said Southern Pacific Railroad Company and said defendants having purchased said land from and under said Company in good faith the title of said defendants and of their heirs, grantees and assigns to said lands is hereby

confirmed; said lands being described as follows, to wit:

N. W. ¼ of Sec. 33, Tp. 2 N., R. 14 W.

Thirty-second: That Miguel Leonis, lately deceased, was a bona fide purchaser from and under defendant the Southern Pacific Railroad Company of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within the meaning of said act of Congress of March 2, 1896, said land having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said Miguel Leonis, having purchased said land from and under said Company in good faith the title of said Miguel Leonis and of his heir, executors and assigns, to said lands is hereby confirmed; said lands being described as follows, to wit:

S. ½ of S. E. ¼ and S. W. ¼ of Sec. 29; all of Sec. 31, Tp. 6 N., R. 12 W.; all of frac. Sec. 7, S. ½ of Sec. 15; N. W. ¼; W. ½ of S. W. ¼ and E. ½ of S. E. ¼ of Sec. 17; all of Sections 21, 23, and 25, Tp. 6 N., R. 13 W. All of Sec. 1; N. E. ¼ of Sec. 11; and N. ½ of Sec. 13, Tp. 6 N., R. 14 W.

Thirty-third: That defendant James B. Randol is a bona fide purchaser from and under defendant, the Southern Pacific Railroad Company, of the following described lands within the meaning of section 4 of said act of Congress of March 3, 1887, and within

the meaning of the act of Congress of March 2, 1896, entitled, "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes"; said land having been erroneously patented by the United States to the Southern Pacific Railroad Company, and said defendant having purchased said land from and under said Company in good faith the title of said defendant and of his heirs, grantees and assigns is hereby confirmed; said lands being described as follows, to wit:

All of Sec. 25, and the S. ½ of Sec. 35, Tp. 6 N., R. 12 W.

All of said lands being north and west of San Bernardino Base and Meridian, California.

It is further ordered, adjudged and decreed that nothing in the original decree entered in this cause on July 19, 1894, shall be construed to enjoin the defendant bona fide purchasers from asserting title to any of the said lands to which rights are by this decree adjudged them.

It is further ordered, adjudged and decreed, that this decree shall not be construed as determining the character of any of the lands described herein with respect to minerals, the title to which is not by this decree confirmed, nor shall it in any wise affect the jurisdiction of the land department of the United States to determine such character of any of said lands, the title to which is not hereby confirmed.

It is further ordered, adjudged and decreed that each party shall pay his own costs in the matter of this motion for further decree.

ROSS,
Circuit Judge.

Decree entered and recorded August 5th, 1898.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 184. In U. S. Circuit Court, Southern District of California. United States vs. Southern Pacific Railroad Co. et al. Decree. Filed Aug. 5, 1898. Wm. M. Van Dyke, Clerk. Joseph H. Call. Spl. U. S. Atty.

Mandate of Supreme Court U. S., Filed April 1, 1902, in Case No. 184.

UNITED STATES OF AMERICA—ss.

The President of the United States of America,
To the Honorable the Judges of the Circuit Court of the United States for the Southern District of California, Greeting:
[Seal]

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between the United States, appellant, and The Southern Pacific Railroad Company, George Loomis et al., appellees, wherein the decree of the said Circuit Court

of Appeals, entered in said cause on the 9th day of October, A. D. 1899, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the Circuit of the United States for the Southern District of California, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed," as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And, whereas, in the present term of October, in the year of our Lord one thousand nine hundred and one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel:

On consideration thereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed, except as to the lands standing in the name of Jackson A. Graves, and as to those lands be, and the same is hereby reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the Southern District of California for further proceedings in conformity with the opinion of this Court.

January 27, 1902.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 19th day of March, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed]: No. 184. Supreme Court of the United States. No. 25. October Term, 1901. The United States vs. The Southern Pacific R. R. Co., George Loomis et al. Mandate. Filed April 1, 1902. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

Number 184.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED, JACKSON A. GRAVES, and Others,

Defendants.

Decree Filed September 8, 1902, in Case No. 184, Pursuant to Mandate of Supreme Court U. S.

This cause coming on further to be heard for final decree as to certain defendants, in open court, this eighth day of September, A. D. one thousand nine hundred and two, in pursuance of a mandate of the Supreme Court of the United States issued on the nineteenth day of March, A. D. one thousand nine hundred and two, and Mr. Joseph H. Call, special assistant United States attorney, appearing for the United States, and Mr. William F. Herrin and Mr. William Singer, Junior, the counsel and attorney respectively, appearing for the defendants; and the Court being duly advised in the premises;

It is by the Court now ordered, adjudged and decreed that the United States of America is the owner by title absolute and in fee and unincumbered, of the lands hereinafter described; and defendants, Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, a corporation organized and created under the laws of Great Britain, and Jackson A. Graves, have no right, title, estate or interest, or lien in or upon said lands, or any thereof, and they and their servants, agents, employees and successors in interest, are forever enjoined and restrained from having or claiming to have any right, title, interest, estate, or lien in or upon said lands, or any thereof, adverse to the United States, said lands being described as follows, to wit:

All of fractional sections three, five and seven; all of section nine; north half and southeast quarter of section seventeen; township five north, range ten west. All of fractional section one; fractional north half and southeast quarter of section three; east half of section eleven, township five north, range eleven west. All of sections thirteen, fifteen, twenty-one, twenty-three, twenty-five, and twenty-seven; east half of section thirty-three; all of section thirty-five; township six north, range eleven west.

All of fractional sections one, three, five, and all of sections nine, eleven, thirteen, fifteen, seventeen, twenty-one, twenty-three, twenty-seven and thirty-three, township six north, range twelve west.

South half of section seven; south half of section nine; all of sections seventeen, nineteen, twenty-one and twenty-nine; fractional section thirty-one, and all of section thirty-three, township seven north, range eleven west. West half of southeast quarter and southwest quarter of section eleven, all of section thirteen; fractional section nineteen; all of sections twenty-three, twenty-five, twenty-nine, thirty-three and thirty-five, township seven north, range twelve west. All of section twenty-five, township seven north, range thirteen west.

Southwest quarter of section seventeen, all of fractional section nineteen; all of section twenty-one; all of section twenty-seven; township five north, range ten west. Southwest quarter of section three, all of fractional section five; all of section nine; west half of section eleven; township five north, range eleven west. All of fractional section one, township five north, range twelve west.

West half of section thirty-three, township six north, range eleven west.

All of said lands being situated north and west of the San Bernardino base and meridian, in Los Angeles County, State of California; and all patents issued by the United States for any of said lands, are hereby annulled.

It is further ordered, adjudged and decreed that the United States have and recover from defendants,

Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, and from Jackson A. Graves, its costs, taxed at ——— dollars, and that execution issue therefor after sixty days from date hereof.

OLIN WELLBORN,
Judge.

Decree entered and recorded September 8th, 1902.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 184. U. S. Circuit Court, Southern District of Cal. United States vs. Southern Pacific Railroad Company. Decree. Filed Sep. 8, 1902. Wm. M. Van Dyke, Clerk. ————, Deputy. Joseph H. Call, for Plaintiff. William Singer, Jr., for Defendants.

Clerk's Certificate to Judgment-Roll in Case No. 184.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, Southern District of California, do hereby certify the foregoing 168 typewritten pages numbered from 1 to 168, both inclusive, to be a full, true and correct copy of the following parts of record in the cause entitled The United States of America, Complainant, vs. The Southern Pacific Railroad Company, et al., Defendants, No. 184, viz.: Amended bill of complaint, filed September 25th, 1891; order of

substitution of Jackson Alpheus Graves as one of the respondents, made April 25th, 1893; answer presented May 31st, 1893, and ordered filed and filed June 12th, 1893; replication filed August 2d, 1892; Defendants' Exhibits 44, 45, 46, 47 and 48, being agreements between the Southern Pacific Railroad Company and the Atlantic & Pacific Fiber Importing & Manufacturing Company, Limited, dated July 23d, 1885; Defendants' Exhibit 49, resolution Atlantic & Pacific Fiber Importing & Manufacturing Company, Limited made on the 27th day of January, 1893; Defendants' Exhibit 9, being patent No. 1 (branch line), to Southern Pacific Railroad Company of California, dated March 29th, 1876; Defendants' Exhibit 10, being patent No. 2, of the branch line of the Southern Pacific Railroad Company, dated December 27th, 1883; Defendants' Exhibit No. 14, being patent No. 6, to the Southern Pacific Railroad Company, dated December 27th, 1883; Defendants' Exhibit No. 18, being patent No. 9, to the Southern Pacific Railroad Company, dated January 9th, 1885; testimony of J. A. Graves, before the Standing Master and Examiner in Chancery, a final decree filed July 19th, 1894; mandate of Supreme Court filed January 7th, 1898; further decree filed August 5th, 1898; mandate of the Supreme Court, filed April 1st, 1902, and further decree filed September 8th, 1902,

as the same appear on file and of record in my office in said cause.

Attest my hand and the seal of said Circuit Court this 30th day of December, 1905.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Filed May 24, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,
Complainant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, et al.,
Defendants.

Complainant's Exhibit "L."

(Leo Longley, Special Examiner.)

In the Circuit Court of the United States, Southern District of California, Southern Division.

No. 600.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

INDEX.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and GARRIT L. LANSING, Trustees, and the CENTRAL TRUST COMPANY OF NEW YORK,

Defendants.

Bill of Complaint in Case No. 600.

To the Judges of the Circuit Court of the United States, for the Southern District of California:

The United States of America, by the Attorney General thereof, and George J. Denis, United States Attorney, and Joseph H. Call, Special Assistant United States Attorney, bring this, their bill of complaint against the Southern Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of California, D. O. Mills and Gerrit L. Lansing, trustees, each a resident and citizen of the State of California, residing at San Francisco in said State, the Central Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York.

I.

And thereupon your orators allege that since the year 1846 the United States have been, and still are, the absolute owners by title in fee simple, and in the possession of, the lands described in Plaintiffs' Exhibit "A" hereto annexed and made a part hereof.

II.

Your orators further show: That by the Act of Congress approved July 27th, 1866, entitled "An Act granting lands to aid in the construction of a rail-

road and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," Congress incorporated the Atlantic & Pacific Railroad Company and granted to said company, to aid in the construction of said railroad, a large amount of lands in the State of California and other States and Territories, and to the whole of which said Act your orators refer. (See United States Statutes, vol. 14, p. 292.)

Your orators further show that by section 18 of said Act, Congress authorized the Southern Pacific Railroad Company, a corporation claiming to be organized under the laws of the State of California, to connect with said Atlantic & Pacific Railroad, and to aid in its construction, and upon the condition that it would make such connection, agreed to make to said Southern Pacific Railroad Company a grant of lands upon the same terms, conditions and limitations as were granted to the said Atlantic & Pacific Railroad Company.

III.

Your orators further show unto the Court, and allege that by the Act of Congress approved March 3, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes" (see U. S. Stats., vol. 16, pp. 573-9), Congress incorporated and created the Texas Pacific Railroad Com-

pany and granted to said company, to aid in the construction of said railroad a large amount of land in the State of California, and other states and territories, and to the whole of which said Act your orators refer.

Your orators further show that said Atlantic & Pacific Railroad Company duly accepted said grant, and the terms and conditions of said act of July 27th, 1866, within the time therein required, and did designate upon plats or maps the whole of its line of route under said act, definitely locating the same from Springfield, Missouri, by way of the points and places named in said act, in the time and manner provided in said act, to the Pacific Ocean at San Buenaventura, in the State of California, and did file such plats or maps designating said line of route in the office of the Commissioner of the General Land Office within the time and in the manner provided in said Act, definitely establishing the whole thereof.

That said company filed maps of definite location designating that part of its said line in the State of California, in said office of the Commissioner of the General Land Office, in the year 1872, and as said plats or maps were so filed in the Interior Department; they were each then approved by the Secretary of the Interior, and upon the filing of such maps or plats as aforesaid the United States withdrew

from market, and reserved all the odd-numbered sections of land in California, within thirty (30) miles of said line of route, including the lands hereinafter described, and in pursuance of orders of the Secretary of the Interior and Commissioner of the General Land Office, said withdrawal and reservation of said lands was made then of record in the General Land Office and United States District Land Offices in California by proper plats, diagrams and maps, to all of which your orators refer.

Your orators further show to the Court that by section 23 of said act of Congress, approved March 3, 1871, it was provided as follows: "That for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California), to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to the said Southern Pacific Railroad Company of California, by the act of July 27th, 1866, provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other Railroad Company."

IV.

Your orators allege that said Atlantic & Pacific Railroad Company did not, within the time or manner required by said act of Congress of July 27, 1866, nor at all, construct or complete any railroad or telegraph line, in whole or in part, within the State of California, and that by the act of Congress of July 6, 1886, (24 Stats., p. 123), all lands and rights to lands granted to and conferred upon said Atlantic & Pacific Railroad Company, and situated within the State of California, were forfeited and resumed to the United States, and said lands were restored to the public domain, including all the odd numbered sections of land for thirty (30) miles on each side of said line of route of said Atlantic & Pacific Railroad Company definitely fixed as aforesaid, between the eastern boundary of California and the Pacific Ocean at San Buenaventura, which lands are still owned by your orators.

Your orators further show unto the Court and allege that all the lands above described were granted by Congress to said Atlantic & Pacific Railroad Company by said act of Congress making said grant to said Company, and from the date of said grant to said company as aforesaid, until said lands and rights to lands were forfeited as aforesaid, said company claimed to own said lands, and had a prospective as well as a present right to said lands; and during all of that time said lands were reserved by the United

States for the benefit of said Atlantic & Pacific Railroad Company.

V.

Your orators are informed and believe that the defendants herein claim that a line of railroad and telegraph from Tehachapi Pass, by way of Los Angeles, to the Colorado River, has been constructed by the Southern Pacific Railroad Company, within the time and in the manner provided by said act of Congress of March 3d, 1871, above referred to, and that said Company did accept said grant and the terms and conditions thereof, and did, in the year 1874, designate its line by a plat thereof, filed in the office of the Commissioner of the General Land Office, and the defendants claim that the lands herein described were granted to said company by said act, and defendants further claim that commissioners appointed by the President of the United States have reported that said railroad was constructed in all respects in compliance with said act; but your orators allege that all of said claims and pretenses are false and unfounded; and your orators show that said Southern Pacific Railroad Company named in said Act of Congress of March 3d, 1871, has not located or constructed any railroad or telegraph line, or any portion thereof, between the points named in section 23 of said act of March 3d, 1871, within the time or manner provided by said act, or at all, nor filed any plat in the Land Of-

fice, nor has any connection ever been made with said Texas Pacific Railroad, at or near the Colorado River or at any other point.

VI.

And your orators further allege that none of said lands were granted to said Southern Pacific Railroad Company or any of the other defendants by said act of March 3d, 1871, and that said lands were not of the category or of the character of lands described in said act of March 3, 1871, to be granted to the company therein named; but, on the contrary, they were lands reserved and otherwise claimed, and are still owned, by the United States.

VII.

Your orators further allege that on March 3d, 1871, the Southern Pacific Railroad Company named in said Act of Congress of that date, was not authorized by its charter to construct or operate the line of railroad from Tehachapi Pass, by way of Los Angeles, to the Colorado River, and thereafter and before any part of any railroad or telegraph line was located or plat definitely fixing the line filed in the Interior Department, or any railroad constructed between the points named in said section 23 of said act of March 3d, 1871, and before said grant took effect, and on August 12th, 1873, said Southern Pacific Railroad Company, did, without any authority from the United States or from the Congress of the United States, enter into certain articles of incorporation

and consolidation with the Southern Pacific Branch Railroad Company, a corporation, thereby creating a new corporation, and taking new powers under such new charter from the State of California, and thereby surrendering to the United States all the grants, rights, franchises and privileges theretofore conferred upon the first said Southern Pacific Railroad Company.

VIII.

And your orators further allege that in the year 1874, and before any part of the railroad between the points named in said section 23 of said act of Congress of March 3, 1871, had been constructed or completed, and before said grant took effect, said Southern Pacific Railroad Company created by said articles of incorporation and consolidation, on August 12th, 1873, consolidated with other railroad companies, corporations, creating another and new corporation, without any authority from the United States, and taking its new charter from the State of California, and thereby surrendering to the United States all the franchises, grants, rights and privileges, if any then remained, which had been conferred by the Congress of the United States under said act of Congress of March 3, 1871.

IX.

Your orators further show and allege that the officers of the Interior Department have erroneously

and without any authority of law caused to be issued to defendant Southern Pacific Railroad Company patents of the United States, in due form of law, for the tracts of land described in Plaintiffs' Exhibit "A," hereto attached, and made a part hereof. That more than ninety days prior to the commencement of this suit the Secretary of the Interior demanded in writing of said Southern Pacific Railroad Company a relinquishment and reconveyance of said lands to the United States, which demand was refused and not complied with by said company.

X.

Your orators further allege that the defendants herein, and each of them, claim some interest in the said lands under and by virtue of the said act of March 3, 1871, and not otherwise. The nature and extent of such claims are unknown to your orators, but your orators allege that such claims are not based upon any legal or equitable right to such lands or any thereof.

Your orators further show that said adverse claims of said defendants hinder and embarrass your orators, and prevent the Department of the Interior from selling and otherwise disposing of said lands under the laws of the United States.

XI.

Your orators further allege that defendants herein,

while claiming and pretending to own some interest in said lands, are now unlawfully removing from said lands wood, timber, minerals, and other valuable deposits, and unlawfully threatening to chop down other trees on said land, and remove other minerals and valuable deposits thereon, and unless enjoined will do so, to the great and irreparable injury of your orators.

XII.

Your orators further allege that the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of five thousand (5,000) dollars.

In tender consideration whereof, and forasmuch as your orators are remediless at and by the strict rules of the common law, and can only be relieved in a Court of equity, your orators pray that their title to said lands described in said Exhibit "A" hereto annexed, may be quieted; that said pretended patents be vacated and decreed to be void, and that the defendants and each of them be forever enjoined from asserting or claiming any right, or title, to said lands adverse to your orators, and that the defendants be forever enjoined from chopping down or carrying away any wood, trees, or timber upon said land, and from removing any minerals or other valuable deposits thereon.

Your orators further pray that the Court will define and determine the rights of your orators to the odd numbered sections of land in California within the thirty-mile limits of the said line of route of said Atlantic & Pacific Railroad Company, as shown by the maps of said Atlantic & Pacific Railroad Company, on file and of record in the General Land Office, and will decree that the United States are the owners in fee of said lands, as against all rights and claims of the defendants based upon or through said grants made by the United States by said Acts of Congress, approved July 27, 1866, and March 3, 1871, except the lands embraced in pending suits of your orators, against said Southern Pacific Railroad Company, described as follows:

"All of the sections of land designated by odd numbers in township three (3) and four (4) north, ranges five (5), six (6) and seven (7) west; township one (1) north, ranges sixteen (16), seventeen (17), and eighteen (18), west; townships six (6) and south three-fourths of township seven (7) north, ranges eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19) west; also townships from number two (2) north to number five (5) north, both numbers included, and ranges from number eight (8) west to number eighteen (18) west, both

numbers included, San Bernardino Base and Meridian, California," as to which lands no relief is sought by this bill.

Your orators pray for such other and further relief as to the Court may seem equitable, and for costs of this suit, and your orators will ever pray.

May it please your Honors to grant unto your orators a writ of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the above-named defendants, the Southern Pacific Railroad Company, D. O. Mills, and Gerrit L. Lansing, trustees, and Central Trust Company of New York, and to each of the other defendants above-named, commanding them on a certain day, and under a certain penalty therein to be inserted, to be and appear before your Honors, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and to good conscience, and your orators will ever pray.

Your orators expressly waive answer under oath by the defendants and each of them.

RICHARD OLNEY.
Attorney General.
JOSEPH H. CALL,
Special Asst. United States Atty.
GEORGE J. DENIS,
United States Attorney.

[Endorsed]: No. 600. In United States Circuit Court, Southern Dist., Cal. United States, vs. Southern Pacific Railroad Co. Bill. Filed May 14, 1894. Wm. M. Van Dyke, Clerk. Joseph H. Call, Spl. Asst. U. S. Atty.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

No. 600.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS, and GARRIT L. LANGSING, Trustees, and the CENTRAL TRUST COMPANY OF NEW YORK,

Defendants.

Answer to Complaint in Case No. 600.

The joint and several answer of the Southern Pacific Railroad Company, D. O. Mills, and Gerrit L. Lansing, Trustees, and the Central Trust Company of New York, to the Bill of Complaint of the United States, plaintiff.

These defendants respectively, now and at all times saving to themselves all and all manner of benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and

imperfections in the said bill of complaint, contained, for answer thereto, or to so much thereof as these defendants are advised that it is material or necessary for them to make answer to, severally answering, say:

I.

The defendants deny that since the year 1846, the United States have been and still are the absolute owners by title in fee simple, or by any title whatsoever, or in anywise or at all, or as alleged in the said bill of complaint, or have been or still are in the possession of the land described in Plaintiff's Exhibit "A," annexed to the complaint, and made a part thereof.

On the contrary, defendants allege that from the year 1846, continuously, and until July 27, 1866, the plaintiff was the owner in fee simple absolute, in possession, and entitled to the possession of all the lands described in exhibit "A" annexed to the plaintiff's bill of complaint; that on the said last mentioned date the Congress of the United States granted a portion of said lands to the defendant; the Southern Pacific Railroad Company, as is hereinafter, with a description of the portion of said land so granted, particularly set forth; that as to said portion of said lands hereinafter described and particularly set forth, the defendants deny that the plaintiff is, or at any time since July 27, 1866, has been the owner in fee simple absolute or otherwise, or in any way, manner, or at

all, or in possession or entitled to the possession thereof.

The defendants allege that from the year 1846 continuously, and until March 3, 1871, the plaintiff was the owner in fee simple absolute, and in possession and entitled to the possession of all the lands described in exhibit "A" other than such thereof as were granted to the defendant, the Southern Pacific Railroad Company, on July 26, 1866, as aforesaid; that on March 3, 1871, the Congress of the United States granted all the lands described in the said exhibit "A," to the defendant, the Southern Pacific Railroad Company, which had not theretofore been granted to the said Southern Pacific Railroad Company by the Act of Congress of July 27, 1866, and the lands so granted to the said defendant, the Southern Pacific Railroad Company, on March 3, 1871, are hereinafter particularly set forth and described.

Defendants deny that the plaintiff is, or at any time since March 3, 1871, has been the owner in fee simple absolute or otherwise, or in possession or entitled to the possession of any of the lands described in Plaintiff's Exhibit "A."

II.

The defendants admit that by an Act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and

telegraph line from the states of Missouri and Arkansas to the Pacific Coast," Congress incorporated the Atlantic & Pacific Railroad Company, and granted to said company to aid in the construction of said railroad a large quantity of public lands; but they aver that such grant was made and subject to the conditions and the limitations in said Act mentioned, to which said Act of Congress reference is hereby made (United States Statutes, volume 14, page 292); and the defendants refer to the whole of said Act of Congress.

The said defendants aver that the Southern Pacific Railroad Company, one of the defendants herein, is a corporation organized and existing under and by virtue of the laws of the State of California, as hereinafter stated, and is a resident and inhabitant of the Northern District of said State and a citizen thereof.

The defendants deny that by section 18 of the said Act of Congress, the United States or Congress agreed to make a grant of lands to the said Southern Pacific Railroad Company upon the same terms, conditions and limitations as were granted to the said Atlantic & Pacific Railroad Company, or upon the condition that the Southern Pacific Railroad Company would make connection with the said Atlantic & Pacific Railroad Company. On the contrary, said defendants allege that by Section 18 of said Act of Congress of July 27, 1866, Congress authorized the

Southern Pacific Railroad Company to connect with the said Atlantic & Pacific Railroad Company at such point, near the boundary line of the State of California as the Southern Pacific Railroad Company should deem most suitable for a railroad line to San Francisco, and did in direct terms make a grant of lands in the State of California to the Southern Pacific Railroad Company, and subject to the conditions and limitations therein provided.

III.

Said defendants admit that by the Act of Congress approved March 3, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes" (United States Statutes, volume 16, pages 573-579), Congress incorporated the Texas Pacific Railroad Company, and granted to said Company, to aid in the construction of said railroad, a large quantity of public lands; but said defendants deny that said grant ever attached to or affected any lands within the State of California, and they aver that such grant was made subject to the conditions and limitations in the said Act last mentioned, to which said Act of Congress reference is hereby made, and these defendants refer to the whole of said Act of Congress

That said defendants deny that said Atlantic & Pacific Railroad Company duly or in anywise accepted said grant.

Said defendants deny that the said Atlantic & Pacific Railroad Company did within the time required, or in any manner or at all, designate upon plats or maps, the whole of its line or any part of its line of route under said Act of July 25, 1866, or did definitely locate the same from Springfield, Missouri, by way of the points and places named in the said Act in the time and manner provided in said Act, to the Pacific Ocean at San Buenaventura, in the State of California, or to any point on the Pacific Ocean.

Said defendants further deny that the said Atlantic & Pacific Railroad Company did file plats or maps designating said line of route in the office of the Commissioner of the General Land Office in the time and in the manner provided in the said Act, definitely establishing the whole or any part thereof; and the said defendants further deny that said Atlantic & Pacific Railroad Company did designate or locate any of its line or route in the State of California, between any points therein, and deny that it ever located or adopted or designated, any part of said line in the State of California, or in any manner provided in the said Act or at all.

Said defendants deny that said Atlantic & Pacific Railroad Company filed maps of definite location, designating part of its said line in the State of California, in the said office of the Commissioner of the General Land Office, in the year 1872, or at any time

or at all, and deny that as said plats or maps were so filed in the Interior Department, they were each then approved by the Secretary of the Interior, and deny that upon the filing of such maps or plats as aforesaid, the United States withdrew from market and reserved all or any of the odd numbered sections of land in California, within thirty miles of said line of route, or including the lands hereinafter described, and deny that in pursuance of orders of the Secretary of the Interior, and the Commissioner of the General Land Office, said withdrawal or reservations of said lands was made then of record in the General Land Office and the United States District Land Office in California, by proper plats, documents and maps, or in any manner or at all; the said defendants further deny that any lands in suit herein fell within the thirty-mile limits of any such line, or were ever withdrawn from market, or reserved for or for the benefit of said Atlantic & Pacific Railroad Company; and deny that the Atlantic & Pacific Railroad Company ever designated a line of railroad between the Colorado River and the Pacific Ocean by a map or maps thereof, filed in the office of the Commissioner of the General Land Office; or made or filed a map or maps of definite location of route or designation of route from the Colorado River to the Pacific Ocean, whether by the most practicable and eligible route or otherwise howsoever.

Said defendants aver that the said Atlantic & Pacific Railroad Company never made any actual or general or definite or any location whatsoever of its line or route of railroad in California.

Said defendants further aver that the pretended location of a route by said Atlantic & Pacific Railroad Company in California, never was or became an actual or a definite location or designation of a general route for a railroad from San Francisco to the Needles, or from the Needles to the Pacific Ocean, or from the point of crossing the Colorado river selected by said Atlantic & Pacific Railroad Company, to the Pacific Ocean, and further aver that such pretended location or designation of route was a colorable and fraudulent location or designation of a route and that such route was also upon an unauthorized and impracticable line; that the maps filed by the said Atlantic & Pacific Railroad Company in the Interior Department and in the office of the Secretary of the Interior, and in the office of the Commissioner of the General Land Office, purporting to show a designation of route in the State of California, and embracing the lands in controversy, were fraudulent, spurious, and manufactured, and deceived the officers of the Government, and were intended so to do

Defendants further aver that the Atlantic & Pacific Railroad Company transmitted to the office of the Secretary of the Interior on March 8th, 1872,

four maps purporting to show the location of portions of the line of railroad of the Atlantic & Pacific Railroad Company: First, from San Francisco to San Miguel Mission, California; second, from a point on the western boundary line of Los Angeles, California, to a point in township seven north, range seven east, of San Bernardino Base and Meridian in said State; third, from the eastern boundary of Arizona, to the Colorado River, and fourth, from the western boundary of Texas to the western boundary of New Mexico. That these maps and all four of them were described upon their face and by endorsements thereon, to be maps of definite location over the territory described thereon, and named therein; that the said maps above mentioned as "third" and "fourth" are the result of actual surveys and are made and prepared to a certain extent in conformity with the rules and regulations of the Interior Department issued and provided for the location of lines of route of railroads receiving land grants from the United States.

Said defendants aver that the said map of the Atlantic & Pacific Railroad Company above mentioned as "first," from San Francisco to San Miguel Mission, California, and said map above mentioned as "second" from a point on the western boundary line of Los Angeles, California, to the point in township

seven north, range seven east to San Bernardino Base and Meridian in said State of California purporting to include the lands in controversy, were not and are not the result of actual surveys made for the purpose of locating the line of railroad of the Atlantic & Pacific Railroad Company in said State; but on the contrary are spurious and fraudulent and depict an impracticable, unsurveyed and unauthorized line of proposed railroad, entirely ignoring the topography of the earth's surface, and are without reference thereto.

That the said last mentioned map was on or about the 8th day of March, 1872, tendered to the Secretary of the Interior, by one C. J. Hillyer as attorney for the said Atlantic & Pacific Railroad Company as a "map designating the line or route of said railroad from a point on the western boundary line of Los Angeles County in the State of California, to a point in township seven north and range seven east of San Bernardino Base and Meridian in said State." That the said map or plat bears on the face thereof an affirmation by one J. Blickensderfer, Jr., purporting to be the chief engineer of the Atlantic & Pacific Railroad Company, to the effect that one E. N. Robinson during the period since the first day of June, 1871, and previous to said first day of June, 1871, had been employed as deputy or division engineer under said Blickensderfer, and that the said deputy or division

engineer as shown by his field notes did actually survey and mark upon the ground the line or route of the Atlantic & Pacific Railroad from a point on the westerly boundary line of Los Angeles County, to a point in township seven north and range seven east of San Bernardino base and meridian, State of California, in the sections and at the times respectively designated by dates included between the flagstaffs upon and along the alleged line of route of said railroad, as delineated on said map, and the said map purported to show the lines of the public surveys in connection with the surveyed line of the route; that such statements embodied in the said affirmation upon the face of said map, were made with the intent and purpose of thereby securing the acceptance of such may by the Secretary of the Interior and the Commissioner of the General Land Office and a withdrawal of lands thereunder, but such statements were and are wholly and willfully false. That the said Robinson never did, as shown by his field notes, or otherwise, survey or mark upon the ground any line or route of the Atlantic & Pacific Railroad as delineated upon said map, and the said map does not show the lines of public surveys in connection with any surveyed line of route of said Atlantic & Pacific Railroad. That the said map or plat bears on the face thereof, a certificate of one Uriel Crocker, as president, the said J. Blickensderfer, Jr., as chief

engineer of said Atlantic & Pacific Railroad Company, certifying that the said map shows the line or route of said railroad from a point on the western boundary of the County of Los Angeles, to a point in township seven north, range seven east of San Bernardino Base and Meridian, in the State of California as definitely fixed in compliance with said Act of Congress, and that the date of the field notes thereof, are truly indicated along the line from station to station upon said map. Such statements so embodied in the said certificate upon the face of said map, were made with the like intent and purpose as the statements in the affirmation aforesaid, but were also wholly and willfully false. The said map did not show any line of route which has been definitely fixed in compliance with said Act of Congress and did not truly indicate the dates of any field work of or on any such line or route.

The said map did not and does not show any practicable or eligible route for any railroad, but was and is a mere sham.

Said defendants further aver that the said four maps being so received together by the Interior Department upon said date, deceived the officers of the Interior Department, who acting under said deception, and believing said four maps to be similar in character and each and all of them to display properly and in conformity with the regulations of the In-

terior Department, the true and definite location of the proposed line of railroad of the Atlantic & Pacific Railroad Company, caused a letter to be issued from the General Land Office on April 22, 1872, which letter is in the words and figures, following, to wit:

"DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

April 22, 1872.

Registrar and Receiver, Los Angeles, Cal.

Gentlemen: I transmit herewith a diagram showing the definite location of the Atlantic & Pacific Railroad, under Act of July 27, 1866, Stat., Vol. 14, p. 292 from a point on the Western boundary of Los Angeles County, to a point in T. 7 N. R. 7 E. on the San Bernardino in your district, showing also the twenty and thirty mile limits of the land grant under said Act, and you are hereby directed to withhold from pre-emption of homestead entry, private sale, or location, all of the odd numbered sections falling within those limits both surveyed and unsurveyed, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road was designated by filing a plat thereof in this office, which was March 12, 1872. The even numbered sections within the twenty mile limit, you will increase in price to $2.50

per acre, and dispose of them at that ratability and only under the pre-emption and homestead laws. The even sections outside of the twenty mile limits are not affected by this withdrawal. Claims initiated by settlers under the pre-emption laws prior to the right of the road attaching March 12, 1872, are not affected by this order.

Be pleased to acknowledge the receipt of this letter without delay.

Very respectfully,

WILLIS DRUMMOND,

Commissioner."

Said defendants aver that said maps "First" and "Second" last above referred to, are not maps showing the definite location of the line of railroad of the Atlantic & Pacific Railroad Company in the State of California; or in reference to any portions thereof; that they are not maps showing the general route of said Atlantic & Pacific Railroad Company in the State of California, and were not intended so to be; that the said Atlantic & Pacific Railroad Company intended that said maps should be taken and accepted as proper and sufficient maps of the definite location of the line of railroad of the said Atlantic & Pacific Railroad Company in certain portions of the State of California, and embracing territory which includes the lands in controversy in this cause. That the said Interior Department accepted the four maps

last above mentioned unaware of the fraud and deception being perpetrated upon it, or the officers thereof; and therefore caused the letter above quoted to be sent by the Commissioner of the General Land Office to the Registrar and Receiver at Los Angeles.

That said defendants further aver that said letter, in view of said deception and said fraud, and of the true character of the said maps, "first" and "second," did not and cannot operate as an order of withdrawal of any lands in the State of California, for the benefit of said Atlantic & Pacific Railroad Company. The said defendants further allege that no lands ever were withdrawn in the State of California or reserved or in anywise taken out of the public domain for the benefit of the said Atlantic & Pacific Railroad Company, or against the rights of the Southern Pacific Railroad Company, one of the defendants herein, or against the rights of the other defendants.

That no rights to or interest in any public lands were or could be acquired by said Atlantic & Pacific Railroad Company by reason of any such attempted location or designation, or any act of acceptance thereof, on the part of the Interior Department.

Said defendants further aver that the said Atlantic & Pacific Railroad Company transmitted on the 15th of August, 1872, to the Interior Department, two other maps, purporting to designate the line of its

railroad in the County of San Bernardino, State of California. First, from a point in township seven north, range seven east, to the Colorado River, and second, from a point between the San Miguel Mission and the Los Angeles County line. That said maps are likewise spurious, fraudulent, and manufactured, and do not depict or show any surveyed route or line of road between the points name of the Atlantic & Pacific Railroad Company in the State of California. That said maps depict a route wholly impracticable, ignoring the topography of the earth's surface, and not upon a route that ever was surveyed by said Atlantic & Pacific Railroad Company in the State of California, and not upon a line or route which was intended to be or could be the definite location or location of general route of the line of railroad of the Atlantic & Pacific Railroad Company; that no rights to or interest in any public lands were or could be acquired by said Atlantic & Pacific Railroad Company by reason of said maps, or attempted location or designation, or by the acceptance of any of the said maps by the Interior Department.

IV.

Said defendants further allege that in the year 1869, the said Atlantic & Pacific Railroad Company filed a map in the Interior Deparment purporting to show the definite location of its line of road in the State of California, from its point of crossing the

Colorado River to the Pacific Ocean, which definite line of location passes through the said State of California far to the north of the lands in controversy, and did not embrace any thereof. That from said year 1869, and down to the year 1885, said Atlantic & Pacific Railroad Company continuously reiterated its claim before the Interior Department that its line of definite location in the State of California, was located by said map of 1869.

Said defendants deny that said Atlantic & Pacific Railroad Company was authorized by said Act, or any other Act of Congress to locate or construct a line of railroad from the point of crossing of the Colorado River to San Francisco. They are advised and believe, and therefore aver that under the said Act of Congress the defendant, the Southern Pacific Railroad Company alone was authorized to construct a line of railroad from the point of crossing of the Colorado River to San Francisco, and to acquire lands under said Act of Congress along and opposite to said line and that the only right which the Atlantic & Pacific Railroad Company ever acquired to locate or construct any line of railroad in the State of California, was the right to locate and construct a road from the crossing of the Colorado river by the most practicable and eligible route to the Pacific Ocean, which route was not on the line pretended to be designated by the said Atlantic & Pacific Railroad Company.

V.

And these defendants further aver that on July 27, 1866, all the lands described in the said exhibit "A" were vacant and unappropriated public lands, to which the United States had full title; and none of said lands had therefore been granted; sold or otherwise disposed of, nor were any of said lands reserved, occupied by homestead settlers, or pre-empted, nor were any of said lands mineral lands, and all of said lands were then free from pre-emption or other claims or rights; and all of the said lands have ever since so remained, except as is hereinafter set forth and stated.

That by said Act of Congress, approved July 27, 1866, the defendant, the Southern Pacific Railroad Company was unauthorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the State of California, as the Southern Pacific Railroad Company should select, and construct a railroad from such point to the City of San Francisco; and to aid in the construction thereof, the said act made a grant of lands to the defendant, the Southern Pacific Railroad Company to the amount of ten odd numbered sections per mile on each side of the line of railroad which it should adopt.

That within two years after the passage of the said Act, the defendant, the Southern Pacific Railroad

Company, filed in the office of the Secretary of the Interior, its acceptance of the terms, conditions and impositions of the said Act; which acceptance was in writing, under the corporate seal of the said Company, and was duly executed in pursuance of the direction of its board of directors, theretofore made.

That prior to January 3, 1867, the defendant, the Southern Pacific Railroad Company, duly established the general route of the entire railroad, which it was authorized by the said act to construct, and on the said date, filed in the office of its Commissioner of the General Land Office, a plat or map designating the said general route, and the entire line of the railroad, which map was thereupon duly accepted and approved by the Commissioner of the General Land Office, and the Secretary of the Interior, and on March 22, 1867, the said officers withdrew all the odd numbered sections within thirty miles of the railroad line shown upon the said plat from pre-emption and homestead entry, sales and other dispositions by the United States and that all the odd numbered sections within thirty miles of the said railroad line, have remained so withdrawn and reserved from pre-emption and homestead entry, sales and other disposition continuously since January 3, 1867, and down to the present time. That the said company commenced the construction of its railroad within the time allowed therefor, and definitely located and constructed those

portions thereof of more than 25 miles each extending from San Francisco to Mojave in ten several sections prior to February 1, 1878, except that section or portion between Tres Pinos and Alcalde and definitely fixed and actually constructed that portion thereof extending from Mojave to its connection with the Atlantic & Pacific Railroad at Needles on the Colorado River, in several sections, prior to December, 1884; and all of said railroad was so completed in a good, substantial and workmanlike manner, and in all respects as required by the said Act and Acts amendatory thereof. That on August 7, 1871, the said company filed in the General Land Office and Department of the Interior, a plat, duly showing the section of its railroad extending from the said commencement point to Gilroy, as the same had been definitely located and constructed, and at various different dates intermediate, August 7, 1871, and December 1, 1884, filed similar plats showing all the other sections of its entire railroad from San Francisco to the Needles, as the same had been definitely located and constructed; each and all of which plats were accepted and approved by the Commissioner of the General Land Office and the Secretary of the Interior.

The commissioners duly appointed by the President of the United States for that purpose, examined the said railroad as it was completed in sections, and

prior to December 27, 1884, duly reported to the President of the United States that all of the said railroad had been completed in a good, substantial and workmanlike manner, and in all respects as required by the said act.

That at the times aforesaid and when the said Southern Pacific Railroad Company filed its said map designating the line of route of its railroad, many of the odd sections within the twenty miles of the railroad line shown thereon, were granted, sold, reserved, occupied by homestead settlers, pre-empted and otherwise disposed of by the United States; and the aggregate quantity of such lands in lieu of which the said company was granted other lands by said Act, was and is more than equal to the aggregate quantity of all the odd numbered sections beyond twenty miles and within thirty miles of the said railroad line; and all of the odd sections which were not otherwise disposed of on January 3, 1867, situated within thirty miles of the said railroad line, were granted to the Southern Pacific Railroad Company by the said Act. And at all the times when the said railroad was definitely fixed and the plats thereof filed as aforesaid, the aggregate quantity of the odd sections within twenty miles of the definitely fixed line of railroad, which were granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of by the United States, and in lieu

of which the said company was granted other lands, was and is more than equal to the aggregate quantity of all the undisposed of odd sections beyond twenty miles and within thirty miles of the said definitely fixed railroad line; and all of the odd sections which were not otherwise disposed of on January 3, 1867, situated within thirty miles from the said definitely fixed railroad line, were granted to the Southern Pacific Railroad Company by the said Act of Congress.

That the said company is, and for a long time prior to the commencement of this suit was entitled to have patents issued by the Government of the United States to it for all the lands granted to it as aforesaid, within thirty miles on each side of its said railroad line; and prior to the commencement of this suit patents were duly issued to the said company for twelve thousand three hundred and eighteen and seventy-seven one hundredths acres of the lands described in exhibit "A," annexed to the plaintiff's bill of complaint.

That prior to the commencement of this suit the Southern Pacific Railroad Company duly selected in lists under the direction of the Secretary of the Interior one hundred and fif— thousand and eighty-three and twenty-eight one hundredths acres of the lands mentioned in the plaintiff's bill of complaint, lying within twenty miles of the said railroad line, and paid for costs and fees thereon, exacted and col-

lected of it by the United States, the sum of seven thousand dollars. That no part of the said sums has been tendered or repaid to the said company by the United States.

That all the lands granted to the defendants, the Southern Pacific Railroad Company, by the said Act of July 27, 1866, are particularly described and shown by Defendant's Exhibit "A," annexed to and made a part of this answer.

VI.

And these defendants further aver that on March 3, 1871, all the lands described in the exhibit "A," annexed to the plaintiff's bill of complaint, and not granted to the Southern Pacific Railroad Company by the said Act of July 27, 1866, were vacant and unappropriated public lands to which the United States had full title.

That by section 23 of said Act of Congress, approved March 3, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," the defendant, the Southern Pacific Railroad Company, was authorized to construct a railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to a point on the Colorado River at or near the southeastern boundary of the State of California, along such line as the said company should adopt; and to aid in the construction thereof, the said

section 23 made a grant of land to the said Southern Pacific Railroad Company, to the amount of ten sections per mile on each side of the line of railroad which it should adopt, not mineral in character, to which the United States had full title, not reserved, granted, or otherwise appropriated, and free from preemption or other claims and rights at the time the said Company filed a plat in the office of the Commissioner of the General Land Office, designating the line of its railroad. And the said section further provided that the Southern Pacific Railroad Company should select other lands, under the direction of the Secretary of the Interior, from the odd-sections within ten miles beyond the limits of the said granted sections, in lieu of such of the said granted sections as were granted, sold, reserved, occupied by homestead settlers, or otherwise disposed of at the date the said plat designating the line of railroad was filed in the office of the Commissioner of the General Land Office.

That the said Section 23 did not, nor did the said land-grant, defeat or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or of any other railroad company; except that the land grant made by it to the Southern Pacific Railroad Company conflicted with and overlapped the land grant made to the same Company by the Act approved July 27th, 1866, hereinbefore set forth, as

is particularly shown by exhibit "A," annexed hereto.

That in April, 1871, the defendant, the Southern Pacific Railroad Company, filed in the office of the Secretary of the Interior, its acceptance of the terms, conditions and impositions of the said act of March 3, 1871; which acceptance was in writing under the corporate seal of the company, and was duly executed in pursuance of the direction of its board of directors, theretofore made.

That prior to April 3, 1871, the said Southern Pacific Railroad Company duly established the general route of the entire railroad, which it was authorized by the said Act of March 3, 1871, to construct, and on the said date filed in the office of the Commissioner of the General Land Office, a plat or map designating the general route and line of said railroad from Tehachapi Pass by way of Los Angeles to Yuma; which map was thereupon duly accepted and approved by the Commissioner of the General Land Office and the Secretary of the Interior, and on April 21, 1871, the said officers withdrew all the odd numbered sections within thirty miles of the railroad line shown upon the said plat, from pre-emption and homestead entry, sales and other dispositions by the United States, and including that portion of the lands in controversy hereinafter described; and all of said lands which lie within thirty miles of the said rail-

road line, have remained so withdrawn and reserved from pre-emption and homestead entry, sales and other disposition continuously since April 21, 1871, and down to the present time.

That the said company commenced the construction of its said railroad in the year 1871, and prior to December 28, 1877, definitely located and constructed its entire railroad from Tehachapi Pass by way of Los Angeles to Yuma, along the line of route designated by its said plat filed April 3, 1871; and all of said railroad was so completed in a good, substantial and workmanlike manner, and in all respects as required by the said act. That the said railroad was completed in five several sections, and plats showing the line thereof as the same was definitely located and constructed, were filed in the General Land Office and the Interior Department at various different dates after the year 1871, and prior to December 28, 1877; each and all of which plats were accepted and approved by the Commissioner of the General Land Office and the Secretary of the Interior.

That Commissioners duly appointed by the President of the United States for that purpose, examined the said railroad as it was completed in sections, and prior to December 28, 1877, duly reported to the President of the United States that all of the said railroad had been completed in a good, substantial

and workmanlike manner, and in all respects as required by the said Act.

That at all the times aforesaid when the Southern Pacific Railroad Company filed its map designating the line of route of its railroad and the said railroad was definitely fixed, many of the odd sections within twenty miles of the railroad line shown thereon, were granted, sold, reserved, occupied by homestead settlers, pre-empted and otherwise disposed of by the United States; and the aggregate quantity of such lands in lieu of which the said company was granted other lands as aforesaid, was and is more than equal to the aggregate quantity of all the undisposed of odd sections beyond twenty miles and within thirty miles of the said railroad line; and all of the odd sections which were not otherwise disposed of, on April 3, 1871, situated within thirty miles from the said railroad line, were granted to the Southern Pacific Railroad Company by the Act of March 3, 1871.

That said company is, and for a long time prior to the commencement of this suit, was, entitled to have patents issued by the Government of the United States to it, for all the lands granted to it as aforesaid, within thirty miles on each side of its said railroad; and prior to the commencement of this suit patents were duly issued to the said company for thirty thousand four hundred and twenty 08/100ths

acres of lands described in exhibit "A" annexed to the plaintiff's bill of complaint.

That prior to the commencement of this suit the Southern Pacific Railroad Company duly selected in lists under the direction of the Secretary of the Interior, sixty-six thousand and eighty-one and forty-two one hundredths acres of lands mentioned in the plaintiff's bill of complaint, lying within twenty miles of the said railroad line, and eighty-eight thousand nine hundred and fifty-seven 06/100ths acres of the lands described in the said exhibit "A" lying within thirty miles of the said railroad line, and paid for costs and fees thereon exacted and collected of it by the United States the sum of nine thousand dollars. That no part of the said sum has been tendered or repaid the said company by the United States.

VII.

Said defendants admit that by Act of Congress approved July 6, 1886, entitled "An Act to forfeit the lands granted to the Atlantic & Pacific Railroad Company, etc." (24 Stats., p. 123) all the lands and rights to lands in California, theretofore granted or conferred upon said Atlantic & Pacific Railroad Company were declared forfeited and restored to the public domain; but they deny that any lands in controversy were ever granted to the Atlantic & Pacific

Railroad Company, or were ever forfeited or resumed, or restored to the public domain by any act of forfeiture or by said act of forfeiture. They admit and aver that no part of said Atlantic & Pacific Railroad had at the time of the passage of said Act of 1886, or has at any time since, been constructed in the State of California.

Said defendants deny that all of the lands above described, or any of them, or any of the lands in controversy herein, were granted by Congress to said Atlantic & Pacific Railroad by Act of Congress of July 27, 1866; and they furthermore deny that from the date of said Act as aforesaid, up to any period of time, or until said Act of forfeiture, said Atlantic & Pacific Railroad Company claimed to own said lands or any thereof.

Said defendants deny that said Atlantic & Pacific Railroad Company had or claimed to have a prospective right or a present right or a prospective as well as a proper right to said lands in controversy. Said defendants furthermore deny that during all of said times or during any of said time, or between any of the dates mentioned, said lands were reserved by the United States for the benefit of said Atlantic & Pacific Railroad Company.

VIII.

These defendants admit that they make the claims

as are set forth in subdivision V of plaintiff's bill of complaint, except that the Southern Pacific Railroad Company designated the line and filed the plat therein mentioned in the year 1871, instead of 1874; but they deny that such claims in whole or in part, are a pretense, false or unfounded, and aver that said claims are in each and every particular sincere, true, well founded and valid. And these defendants deny that the Southern Pacific Railroad Company named in the Act of Congress of March 3, 1871, has not located and constructed the railroad and telegraph line between the points named in section 23 of the said Act, within the time and manner provided in said Act; and deny that the said company has not filed a plat in the Land Office, nor made a connection with the Texas Pacific Railroad at or near the Colorado river, and deny that none of the said lands were granted to said Southern Pacific Railroad Company or to any of the other defendants by said Act of March 3, 1871, or that said lands are not of the category or of the character of the lands described in said Act of March 3, 1871, to be granted to the company therein named, and deny that said lands were lands reserved or otherwise claimed or still owned by the United States; on the contrary, said defendants allege, that the said lands were granted by said Act of Congress of March 3, 1871, to the said defendant, the Southern Pacific Railroad Company, and were

earned by the said defendant, the Southern Pacific Railroad Company, by the construction of its road within the time and manner required by law, and as hereinbefore stated.

The defendants further deny that their claim or claims to the said lands hinder or embarrass the plaintiff, or prevent the Department of the Interior from selling or otherwise disposing of said lands, or any part thereof; on the contrary, the defendants allege that the plaintiff has no right, title or interest whatsoever in or to said lands or any part thereof; that all of the said lands were granted to and are owned by these defendants as is hereinbefore particularly set forth, and that the Department of the Interior has no authority or power to sell or in anywise dispose of said lands.

IX.

Answering paragraph VII of the plaintiff's complaint, the defendants deny the same, and all thereof.

Furthermore, said defendants allege that on or about the 2d day of December, 1865, a corporation was organized under the laws of the State of California, under the corporate name and style of the Southern Pacific Railroad Company, and under a general law of said State, approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto,"

which Act is printed in the Statutes of California, 1861, p. 601, and pray to refer thereto; that said corporation was formed for the purpose and with the corporate power as stated in the Articles of Incorporation, of constructing, owning and maintaining a railroad from some point on the Bay of San Francisco, in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego, to the town of San Diego, in said State; thence eastward through said County of San Diego to the eastern line of the State of California, there to connect with a contemplated railroad to the Mississippi River, and they refer to said Articles of Incorporation for the precise contents, purport and effect thereof.

The defendants furthermore allege that on or about the 11th day of October, A. D. 1870, under and by virtue of the general laws of the State of California, in that behalf, the said Southern Pacific Railroad Company, the San Francisco & San Jose Railroad Company, the Santa Clara & Pajaro Valley Railroad Company, corporations organized and existing under the laws of the State of California, entered into Articles of Consolidation and Amalgamation, consolidating and amalgamating their capital stock, debts, property, assets and franchises under the name of the Southern Pacific Railroad Company, in the manner provided by the laws of California,

and such Articles were signed, published and filed as provided by the laws of California, and they pray leave to refer to such Articles of Consolidation and Amalgamation material to any purposes of this suit, and to the laws of California authorizing the same, and to the laws of California affecting the corporations aforesaid, or any of them, and to the amendatory Articles of the Southern Pacific Railroad Company filed.

And defendants furthermore allege that on or about the 12th day of August, 1873, under and by virtue of the laws of the State of California, on that behalf, the said Southern Pacific Railroad, as it existed after the said consolidation and amalgamation of 1870, and composed of the consolidated and amalgamated companies above referred to, and the Southern Pacific Branch Railroad Company, a corporation, organized and then existing under the laws of California, formed for the purpose and with the corporate powers stated in its Articles of Incorporation, of constructing, owning, and maintaining a railroad within the State of California, did consolidate and amalgamate their capital stock, debts, property, assets and franchises under the name and style of the Southern Pacific Railroad Company, and entered into Articles of Consolidation and Amalgamation, which said Articles were duly signed, published and filed, as required by the laws of California, and they

pray leave to refer to such Articles so far as material to this suit, and to the laws of California authorizing the same. They aver that such consolidation and amalgamation were real and not pretended; they deny that said Articles of Incorporation and Consolidation were entered into without any authority from the United States or from the Congress of the United States; and they deny that by such Articles of agreement of consolidation and amalgamation, or by any consolidation and amalgamation, a new capital stock or a new or different corporation was created, or purported to be created, but they aver that the corporation thereafter existing was a consolidation and amalgamation of the theretofore existing corporations, and not a newly created corporation. As to the contents, purport and effect of the Articles of Incorporation of the consolidated companies, they pray leave to refer to the same if in anywise material to this suit; and they pray leave to refer to the laws of the State of California, as existing prior to 1873, authorizing the consolidation and amalgamation of railroad companies incorporated under the laws of the State. The defendants furthermore deny that by said Articles of Incorporation and Amalgamation the defendant, Southern Pacific Railroad Company, surrendered to the United States all or any of the grants, rights, franchises or privileges

theretofore conferred upon it, or upon the Southern Pacific Railroad Company as it existed prior thereto,

X.

Answering paragraph VIII of the plaintiff's complaint, the defendants deny each and all thereof, and allege that on or about the 18th day of December, 1874, under and by virtue of the law of the State of California, on that behalf, the said Southern Pacific Railroad Company, as it existed after the said consolidation and amalgamation of 1873, and composed of the consolidating and amalgamating companies above referred to, did consolidate and amalgamate its capital stock, its property and assets and franchises, under the name and style of the Southern Pacific Railroad Company, and entered into Articles of Consolidation and Amalgamation; and that said Articles were duly signed, published, and filed as required by the laws of the State of California. They pray leave to refer to said Articles, so far as material to this suit, and to the laws of California authorizing the same. They aver that such consolidation and amalgamation and such Articles of Consolidation and Amalgamation, were real and not pretended; they deny that said Articles of Incorporation and Consolidation were entered into without any authority from the United States or from the Congress of the United States; and they deny that by such Articles of

Agreement of Consolidation and Amalgamation, or by any such consolidation and amalgamation a new capital stock or a new or different corporation was created or purported to be created, but they aver that the corporation thereafter existing was a consolidation and amalgamation of the theretofore existing corporations, and not a newly created corporation. As to the contents, purport and effect of the Articles of Incorporation of the consolidated companies, they pray leave to refer to the same, if anywise material to this suit; and they pray leave to refer to the laws of the State of California, as existing prior to 1873, authorizing the consolidation and amalgamation of railroad companies incorporated under the laws of the State; the defendants furthermore deny that by said Articles of Incorporation and Amalgamation the defendant, the Southern Pacific Railroad Company surrendered to the United States all or any of the grants, rights, franchises or privileges theretofore conferred upon it, or upon the Southern Pacific Railroad Company as it existed prior thereto.

These defendants deny that such Articles of Consolidation and Amalgamation were illegal or void or unauthorized or prohibited by the laws of the State of California, or were unauthorized or prohibited by the laws of the United States, or were entered into without authority from the Congress of the United

States, or without other competent authority; but on the contrary, they allege that the consolidation and amalgamation of said railroad companies were made in conformity with the laws of the State of California, whose action in that behalf was fully authorized and recognized by the Congress of the United States, and that such amalgamation and consolidation were and are in all respects valid.

XI.

Answering Paragraph IX of plaintiff's complaint, the defendants deny the same and all thereof, and allege that in due course of law, and with proper authority, the Interior Department has issued and caused to be issued to the defendant, the Southern Pacific Railroad Company, patents of the United States in due form, for the certain tracts of land described in Plaintiff's Exhibit "A" attached to plaintiff's bill of complaint. They aver that such patents were real and not pretended, and were duly recorded in the General Land Office before they were delivered to said Company, and still remain so of record, and did convey and confirm to said Company a portion of the lands in suit herein, and since the delivery thereof the same have been recorded in the counties of Los Angeles and San Bernardino and Kern in the State of California.

XII.

Answering paragraph X of the plaintiff's bill of

complaint, the defendants allege that the defendants D. O. Mills and Gerrit L. Lansing, trustees, claim to be and are trustees of certain mortgage to secure the payment of certain negotiable bonds, and claim that such bonds have been sold, issued and delivered to various persons for value, and without notice of any claims or ownership of the complainant to said lands, and they deny that such claims are unfounded, or are not based upon any legal or equitable right to such lands, but on the contrary allege that such claims are well founded and valid.

And these defendants further answering say that heretofore, and on or about the first day of April, 1875, the Southern Pacific Railroad Company executed to the defendant D. O. Mills and one Lloyd Tevis a mortgage bearing date of that day, and covering all the lands mentioned in the plaintiff's complaint here, to secure the proposed issue of negotiable mortgage bonds of said Southern Pacific Railroad Company therein referred to, a copy of which mortgage is filed herewith and marked Defendant's Exhibit "B," and pray to be taken as a part of this answer. That negotiable mortgage bonds to very large amounts were from time to time between said first day of April, 1875, and October 1st, 1888, duly issued thereunder and sold to persons who purchased the same in good faith and for full and valuable consideration, and that of such bonds there are now out-

standing in the hands of bona fide holders thereof, for value, bonds to the amount of their par value of $31,293,500. That said Gerrit L. Lansing named as defendant in this suit has been duly substituted a mortgage trustee thereunder, in place and stead of said Lloyd Tevis, named as trustee in said original mortgage.

XIII.

The defendants further allege that heretofore and on or about the 25th day of August, 1888, and before the institution of this suit, the said Southern Pacific Railroad Company executed to the Central Trust Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and one of the defendants named in said bill, a further mortgage or deed of trust, covering all the lands mentioned in plaintiff's complaint herein, bearing date on said 25th day of August, 1888, to secure a proposed issue of negotiable mortgage bonds of said Southern Pacific Railroad Company therein referred to, a copy of which mortgage is filed herewith and marked exhibit "C," and prayed to be taken as a part of this answer. That negotiable mortgage bonds to large amounts were from time to time subsequent to said 25th day of August, 1888, and prior to the commencement of this suit, duly issued thereunder and sold to persons

who purchased the same in good faith and for full value and valuable consideration, and that of such bonds so issued, prior to the institution of this suit, bonds to the amount of upwards of $10,497,000 are now outstanding in the hands of bona fide holders thereof for value.

XIV.

Answering paragraph XI of plaintiff's bill of complaint, these defendants deny that they are unlawfully removing from any of the lands in suit, or from said lands, any wood or timber or minerals or other valuable deposits, or are unlawfully threatening to chop down other trees or any trees on said lands, or unlawfully to remove other minerals or valuable deposits thereon, and deny that unless enjoined will do so in any manner or at all, or to the great or irreparable injury of the plaintiff.

These defendants further aver that they and each of them are not residents or inhabitants of the Southern District of California, and that none of the defendants in this action are residents of or inhabitants of the Southern District of California. On the contrary, the defendant the Southern Pacific Railroad Company is a resident and inhabitant of the Northern District of California; the defendant D. O. Mills is a resident and inhabitant of the State of New York and of the Southern District of New

York; the defendant Gerrit L. Lansing is a resident and inhabitant of the Northern District of California.

These defendants and each of them herewith reiterate their pleas to the jurisdiction of this Court heretofore entered and against said jurisdiction.

And these defendants deny all and all manner of matter, cause or thing in the plaintiff's bill of complaint contained, material or necessary for these defendants to make answer to, and not herein well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of any of the defendants. All of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court may direct; and these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOSEPH D. REDDING,

Solicitor for Defendants herein Answering.

WM. F. HERRIN and

WM. SINGER, Jr.,

Of Counsel.

[Endorsed]: No. 600. U. S. Circuit Court, Ninth Circuit, So. Dist. of Cal. United States of America, Plaintiff, vs. Southern Pacific R. R. Co., et al., Defendants. Answer.

Service of the within Answer is hereby admitted this 10 day of January, A. D. 1895.

JOSEPH H. CALL,
Attorney for Compl.

Filed Jan. 10, 1895. Wm. M. Van Dyke, Clerk.

In the United States Circuit Court, Southern District of California, Ninth Circuit.

No. 600.

UNITED STATES OF AMERICA,
Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY and Others,
Defendants.

Replication in Case No. 600.

Replication of the United States to the Answer of Defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing what-

soever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be, ready to aver and prove as this Honorable Court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

JOSEPH H. CALL,

Special Asst. U. S. Atty. and of Counsel for Complainant.

JOSEPH H. CALL,

Special Asst. U. S. Atty. and of Counsel for Complainants.

[Endorsed]: No. 600. In the U. S. Circuit Court, Southern Dist. of Cal. United States of America, Complainant, vs. Southern Pacific Railroad Co. et al., Defendants.

Due service hereof admitted by copy this 23 Jan., 1895.

JOSEPH D. REDDING,

Solicitor for said Defendant.

Filed Jan. 23, 1895. Wm. M. Van Dyke, Clerk. Joseph H. Call, Special Asst. U. S. Atty.

In the United States Circuit Court, Ninth Circuit, Southern District of California.

No. 600.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, Trustees, and the CENTRAL TRUST COMPANY OF NEW YORK,
Defendants.

Decree Filed June 6, 1898, in Case No. 600.

This cause coming on for final decree this 6th day of June, A. D. 1898, in open court and the United States having appeared by Mr. Joseph H. Call, Special Assistant United States Attorney, and the defendants having appeared by Mr. Wm. F. Herrin and Mr. Wm. Singer, Jr., their counsel and attorney, respectively; and the testimony having been taken and the cause duly argued and submitted; and by consent of parties and order of Court, Homer S. King, trustee, having been substituted for Gerrit L. Lansing, trustee, lately deceased, and the Court being now fully advised in the premises, it is by the Court now ordered, adjudged and de-

creed that the United States of America are the owners by title in fee simple, absolute, unencumbered, of all the lands hereinafter described and all patents heretofore issued by the United States to the defendant Southern Pacific Railroad Company (a corporation), to or for any of said lands, are hereby decreed to be null and void and are hereby vacated, and the defendants Southern Pacific Railroad Company, D. O. Mills and Homer S. King, trustees of a certain mortgage or deed of trust dated April 1, 1875, executed by said Southern Pacific Railroad Company, and the Central Trust Company of New York, trustee of a certain mortgage or deed of trust executed by said Southern Pacific Railroad Company, dated August 25, 1888, be and they each hereby are forever enjoined and restrained from having or claiming any right, title, interest or lien in or to any of said lands and the title of the United States to said lands is hereby quieted; said lands being described as follows, to wit:

All the sections and parts of sections of land in the State of California, surveyed and unsurveyed, designated by odd numbers, within thirty miles on each side of the line of route of the Atlantic and Pacific Railroad Company from the Colorado River to the Pacific Ocean at or near San Buena Ventura, California, and coterminous with said line of route,

as designated and established by the maps filed by said Atlantic and Pacific Railroad Company in the General Land Office and in the Department of the Interior in the year one thousand eight hundred and seventy-two, copies of which were introduced in evidence in this cause and are now on file herein, to which maps, designating said line of route, reference is hereby made; excepting, however, from the lands so described, and from the operation of this decree, the following specific tracts of land, which are not embraced by this suit, to wit:

All the sections of land, surveyed and unsurveyed, designated by odd numbers, in townships three (3) and four (4) north; ranges five (5), six (6) and seven (7) west; township one (1) north, ranges sixteen (16), seventeen (17) and eighteen (18) west; township six (6) and south three-fourths of township seven (7) north, ranges eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19) west, also all of the sections of land designated by odd numbers, as shown by the public surveys, embraced within the townships from number two (2) north to number five (5) north, both numbers included, and ranges from number eight (8) west to number eighteen (18) west, both numbers included.

The fractional N.E. 1/4 of Sec. 5, T. 1 S., R. 6 W.

The N.W. 1/4 of Sec. 9, T. 1 S., R. 6 W.

The N. 1/2 of Sec. 21, T. 1 S., R. 7 W.

The S. 1/2 of Sec. 21, T. 1 S., R. 7 W.

The E. 1/2 of N.E. 1/4 and E. 1/2 of S.E. 1/4 of Sec. 1, T. 1 S., R. 8 W.

The W. 1/2 of N.E. 1/4; W. 1/2 of S.E. 1/4 and W. 1/2 of Sec. 1, T. 1 S., R. 8 W.

All of Sec. 11, T. 1 S., R. 8 W.

All of fractional Sec. 15, T. 1 S., R. 8 W.

Lots 1 and 2 of Sec. 21, T. 1 S., R. 8 W.

The N. 1/2 of N.E. 1/4 of Sec. 23, T. 1 S., R. 8 W.

Lots 1, 2, 3 and 4 of Sec. 25, T. 1 S., R. 8 W.

The S. 1/2 of S.E. 1/4 and S. 1/2 of S.W. 1/4 of Sec. 27, T. 1 S., R. 8 W.

Lots 6 and 7 of Sec. 33, T. 1 S., R. 9 W.

Lot 5 of Sec. 33, T. 1 S., R. 9 W.

The S. 1/2 of S.W. 1/4 and Lots 1, 2, 3 and 4 of Sec. 35, T. 1 S., R. 9 W.

Lot 1 of Sec. 1, T. 1 S., R. 11 W.

Lot 1 of N.W. 1/4 of Sec. 7, T. 1 S., R. 11 W.

Lot 5 of S.E. 1/4 of Sec. 7, T. 1 S., R. 11 W.

Lot 6 of S.E. 1/4 of Sec. 7, T. 1 S., R. 11 W.

Lots 7 and 8 of N.E. 1/4 of Sec. 7, T. 1 S., R. 11 W.

The E. 1/2 of N.E. 1/4 and Lot 6 of Sec. 13, T. 1 S., R. 11 W.

The W. 1/2 of N.E. 1/4; E. 1/2 of N.W. 1/4; N. 1/2 of S.W. 1/4 and Lots 1, 2, 3, 4 and 5 of Sec. 13, T. 1 S., R. 11 W.

Lot 1 of Sec. 3, T. 1 S., R. 12 W.

Lot 5 of Sec. 3, T. 1 S., R. 12 W.

Lots 2 and 3 of Sec. 5, T. 1 S., R. 12 W.

The N.E. 1/4 of Sec. 7, T. 1 S., R. 12 W.

N.E. 1/4 of S.W. 1/4 of Sec. 7, T. 1 S., R. 12 W.

Lots 3 and 4 of Sec. 7, T. 1 S., R. 12 W.

Lots 1 and 2 of Sec. 11, T. 1 S., R. 12 W.

The N.W. 1/4 of N.W. 1/4 of Sec. 11, T. 1 S., R. 12 W.

The S.E. 1/4 of N.W. 1/4 and N.E. 1/4 of S.W. 1/4 of Sec. 11, T. 1 S., R. 12 W.

The E. 1/2 of N.E. 1/4 of Sec. 13, T. 1 S., R. 12 W.

The N.E. 1/4 of Sec. 15, T. 1 S., R. 12 W.

The S.E. 1/4 of S.E. 1/4 and N.E. 1/4 of Sec. 17, T. 1 S., R. 12 W.

The N.E. 1/4 of S.E. 1/4 of Sec. 17, T. 1 S., R. 12 W.

The N. 1/2 of S.E. 1/4 of Sec. 19, T. 1 S., R. 12 W.

The N.W. 1/4 of N.W. 1/4 of Sec. 19, T. 1 S., R. 12 W.

The N.W. 1/4 of S.W. 1/4 and N. 1/2 of Sec. 29, T. 1 S., R. 12 W.

S.E. 1/4 of Sec. 29, T. 1 S., R. 12 W.

The E. 1/2 of N.E. 1/4; E. 1/2 of S.E. 1/4 and N.W. 1/4 of Sec. 31, T. 1 S., R. 12 W.

Lot 1 of Sec. 11, T. 1 S., R. 13 W.

The N.E. 1/4 of N.E. 1/4; S.E. 1/4 of S.E. 1/4 and Lots 1 and 4 of Sec. 13, T. 1 S., R. 13 W.

Lots 3 and 4 of Sec. 25, T. 1 S., R. 13 W.

Lot 10 of Sec. 3, T. 1 S., R. 14 W.

The S. 1/2 of N.E. 1/4 of Sec. 3, T. 1 S., R. 14 W.

The E. 1/2 of S.E. 1/4 and Lots 1 and 2 of Sec. 3, T. 1 S., R. 14 W.

The S.W. 1/4 of N.W. 1/4 and Lots 3, 4, 5 and 7 of Sec. 3, T. 1 S., R. 14 W.

The E. 1/2 of S.W. 1/4; S.W. 1/4 of S.W. 1/4; E. 1/2 of N.E. 1/4 and S.E. 1/4 of Sec. 5, T. 1 S., R. 14 W.

The N.W. 1/4 of S.W. 1/4; W. 1/2 of N.E. 1/4 and N.W. 1/4 of Sec. 5, T. 1 S., R. 14 W.

The E. 1/2 of N.E. 1/4 of Sec. 7, T. 1 S., R. 14 W.

The W. 1/2 of N.E. 1/4 of Sec. 7, T. 1 S., R. 14 W.

The N.W. 1/4 of Sec. 7, T. 1 S., R. 14 W.

The N. 1/2 of S.E. 1/4 and Lot 3 of Sec. 7, T. 1 S., R. 14 W.

The S.W. 1/4 of S.E. 1/4 of Sec. 7, T. 1 S., R. 14 W.

N.W. 1/4 of N.W. 1/4 of Sec. 11, T. 1 S., R. 14 W.

The E. 1/2 of S.E. 1/4 of Sec. 11, T. 1 S., R. 14 W.

The W. 1/2 of S.E. 1/4 of Sec. 11, T. 1 S., R. 14 W.

Lots 1, 2, 3 and 4 of Sec. 23, T. 1 S., R. 14 W.

N.W. 1/4 of Sec. 25, T. 1 S., R. 14 W.

Lots 1-S.E. 1/4 of N.E. 1/4; N. 1/2 of S.E. 1/4; S.E. 1/4 of S.E. 1/4 and E. 1/2 of S.W. 1/4 of Sec. 1, T. 1 S., R. 15 W.

The E. 1/2 of N.W. 1/4; S.W. 1/4 of N.E. 1/4 and Lot 2 of Sec. 1, T. 1 S., R. 15 W.

The S.W. 1/4 of S.E. 1/4 of Sec. 1, T. 1 S., R. 15 W.

The S.W. 1/4 of S.W. 1/4 of Sec. 1, T. 1 S., R. 15 W.

The N.W. 1/4 of S.W. 1/4 of Sec. 1, T. 1 S., R. 15 W.

The W. 1/2 of S.E. 1/4 and W. 1/2 of N.E. 1/4 of Sec. 11, T. 1 S., R. 15 W.

The N.E. 1/4 of S.E. 1/4 and S.E. 1/4 of N.E. 1/4 of Sec. 11, T. 1 S., R. 15 W.

The N.E. 1/4 of N.E. 1/4 of Sec. 11, T. 1 S., R. 15 W.

S. 1/2 of N.W. 1/4 and S.W. 1/4 of Sec. 11, T. 1 S., R. 15 W.

The S.E. 1/4 of S.E. 1/4 of Sec. 11, T. 1 S., R. 15 W.

Lot 1 of Sec. 3, T. 2 S., R. 11 W.

The N.E. 1/4 of S.E. 1/4 & S. 1/2 of S.E. 1/4 of Sec. 9, T. 2 S., R. 11 W.

Lots 1 & 2 of Sec. 3, T. 2 S., R. 13 W.

Frac. of Lot 1 of Sec. 5, T. 2 S., R. 13 W.

Frac. of Lot 1 of Sec. 5, T. 2 S., R. 13 W.

The S. 1/2 of N.E. 1/4 of Sec. 11, T. 2 S., R. 14 W.

The S.W. 1/4 of Sec. 13, T. 2 S., R. 14 W.

All of factional Sec. 17, T. 2 S., R. 14 W.

The S.W. 1/4 of N.E. 1/4; W. 1/2 of S.E. 1/4 and W. 1/2 of Sec. 11, T. 1 N., R. 4 W.

The frac. S.W. 1/4 of Sec. 13, T. 1 N., R. 4 W.

The frac. N.W. 1/4 of Sec. 27, T. 1 N., R. 5 W.

Lots 2 and 3 of N.E. 1/4 of Sec. 27, T. 1 N., R. 5 W.

The frac'l S.E. 1/4 of Sec. 27, T. 1 N., R. 5 W.

The S.W. 1/4 of Sec. 27, T. 1 N., R. 5 W.

The W. 1/2 of S.E. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The W. 1/2 of Sec. 11, T. 1 N., R. 6 W.

The S. 1/2 of S.E. 1/4 of Sec. 13, T. 1 N., R. 6 W.

The N. 1/2 of S.E. 1/4 of Sec. 13, T. 1 N., R. 6 W.

The S.W. 1/4 of Sec. 13, T. 1 N., R. 6 W.

The N.E. 1/4 of Sec. 15 T. 1 N., R. 6 W.

The N.W. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The E. 1/2 of S.E. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The W. 1/2 of S.W. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The E. 1/2 of S.W. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The W. 1/2 of S.W. 1/4 of Sec. 15, T. 1 N., R. 6 W.

The E. 1/2 of N.E. 1/4 of Sec. 17, T. 1 N., R. 6 W.

The E. 1/2 of N.E. 1/4 and W. 1/2 of S.E. 1/4 of Sec. 23, T. 1 N., R. 6 W.

The S. W. 1/4 of N.E. 1/4; S.E. 1/4 of N.W. 1/4 and S.W. 1/4 of Sec. 23, T. 1 N., R. 6 W.

The W. 1/2 of N.W. 1/4 of Sec. 23, T. 1 N., R. 6 W.

The E. 1/2 of S.E. 1/4 of Sec. 23, T. 1 N., R. 6 W.

The N.W. 1/4 of N.W. 1/4; N.E. 1/4 of N.E. 1/4; S. 1/2 of N.E. 1/4; S. 1/2 of N.W. 1/4 and S. 1/2 of Sec. 25, T. 1 N., R. 6 W.

The N.W. 1/4 of N.E. 1/4 and N.E 1/4 of N.W. 1/4 of Sec. 25, T. 1 N., R. 6 W.

The N.W. 1/4 of N.E. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The E. 1/2 of N.E. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The S.W. 1/4 of N.E. 1/4; N.W. 1/4 of S.E. 1/4 and N.W. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The E. 1/2 of S.E. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The S.W. 1/4 of S.E. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The E. 1/2 of S.W. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The W. 1/2 of S.W. 1/4 of Sec. 27, T. 1 N., R. 6 W.

The W. 1/2 of Sec. 29, T. 1 N., R. 6 W.

The E. 1/2 of S.E. 1/4 of Sec. 29, T. 1 N., R. 6 W.

The W. 1/2 of S.E. 1/4 of Sec. 29, T. 1 N., R. 6 W.

The E. 1/2 of N.E. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The N. 1/2 of S.W. 1/4 and W. 1/2 of N.E. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The frac. N.W. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The W. 1/2 of S.E. 1/4 and S. 1/2 of S.W. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The S.E. 1/4 of S.E. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The N.E. 1/4 of S.E. 1/4 of Sec. 31, T. 1 N., R. 6 W.

The N.E. 1/4 of Sec. 35, T. 1 N., R. 6.

The E. 1/2 of Sec. 35, T. 1 N., R. 6.

The N.W. 1/4 of Sec. 35, T. 1 N., R. 6 W.

The S.W. 1/4 of Sec. 35, T. 1 N., R. 6 W.

Lots 1 and 2 of Sec. 21, T. 1 N., R. 7 W.

Lots 3 and 4 of Sec. 21, T. 1 N., R. 7 W.

The frac. E. 1/2 of Sec. 27, T. 1 N., R. 7 W.

The N.W. 1/4 of N.E. 1/4; E. 1/2 of N.E. 1/4 S.E. 1/4 of S.E. 1/4, and Lots 1, 2, 3 & 4 of Sec. 35, T. 1 N., R. 7 W.

The N.E. 1/4 of N.W. 1/4 of Sec. 13, T. 1 N., R. 8 W.

The S.E. 1/4 of N.W. 1/4 of Sec. 13, T. 1 N., R. 8 W.

The S.W. 1/4 of N.W. 1/4 of Sec. 13, T. 1 N., R. 8 W.

The N.W. 1/4 of N.W. 1/4 of Sec. 13, T. 1 N., R. 8 W.

The W. 1/2 of S. W. 1/4 of Sec. 13 T. 1 N., R. 8 W.

The S. E. 1/4 of Sec. 19, T. 1 N., R. 8 W.

The E. 1/2 of S.W. 1/4 and S.E. 1/4 of Sec. 21, T. 1 N., R. 8 W.

The S.W. 1/4 of S.W. 1/4 of Sec. 21, T. 1 N., R. 8 W.

The N.W. 1/4 of S.W. 1/4 of Sec. 21, T. 1 N., R. 8 W.

The W. 1/2 of N.E. 1/4 of Sec. 23, T. 1 N., R. 8 W.

The E. 1/2 of N.E. 1/4 of Sec. 23, T. 1 N., R. 8 W.

Lots 1, 2, & 3, of Sec. 25, T. 1 N., R. 8 W.

The S. 1/2 of S.W. 1/4 of Sec. 15, T. 1 N., R. 9 W.

The S. 1/2 of S.E. 1/4 of Sec. 19, T. 1 N., R. 9 W.

The N. 1/2 of S.E. 1/4 and S.W. 1/4 of Sec. 21, T. 1 N., R. 9 W.

S. 1/2 of S.E. 1/4 of Sec. 21, T. 1 N., R. 9 W.

The S.W. 1/4 of S.W. 1/4 of Sec. 15, T. 1 N., R. 10 W.

The E. 1/2 of N.E. 1/4 and frac. S.E. 1/4 of Sec. 19, T. 1 N., R. 10 W.

N.E. 1/4 of S.W. 1/4 and Lot 3 of Sec. 21, T. 1 N., R. 10 W.

The N.E. 1/4 of N.E. 1/4 and Lot 4 of Sec. 21, T. 1 N., R. 10 W.

The N. 1/2 of N.E. 1/4 of Sec. 25, T. 1 N., R. 10 W.

The E. 1/2 of S.W. 1/4; S.E. 1/4 and Lot 2 of Sec. 7, T. 1 N., R. 11 W.

N.W. 1/4 of N.W. 1/4 of Sec. 13, T. 1 N., R. 11 W.

The E. 1/2 of S.W. 1/4 of Sec. 13, T. 1 N., R. 11 W.

All frac. Sec. 15, T. 1 N., R. 15 W.

The S. 1/2 of N.E. 1/4 of Sec. 17, T. 1 N., R. 11 W.

The S.E. 1/4 of N.W. 1/4 of Sec. 17, T. 1 N., R. 11 W.

The N. 1/2 of S.E. 1/4 and Lots 3 and 4 of Sec. 17, T. 1 N., R. 11 W.

The N.W. 1/4 of N.E. 1/4 and Lots 3 and 4 of Sec. 23, T. 1 N., R. 11 W.

The S.W. 1/4 of N.W. 1/4 and Lot 1 of Sec. 23, T. 1 N., R. 11 W.

Lots 1 and 2 of N.E. 1/4 of Sec. 3, T. 1 N., R. 12 W.

Lot 3 of N.W. 1/4 of Sec. 3, T. 1 N., R. 12 W.

Lot 4 of N.W. 1/4 of Sec. 3, T. 1 N., R. 12 W.

Lot 5 of Sec. 3, T. 1 N., R. 12 W.

The N.E. 1/4 of S.E. 1/4 of Sec. 3, T. 1 N., R. 12 W.

Lots 1, 8 and 9 of Sec. 5, T. 1 N., R. 12 W.

Lot 2 of Sec. 5, T. 1 N., R. 12 W.

Lots 3, 4, 5, 6, & 7 of Sec. 5, T. 1 N., R. 12 W.

Lots 1 and 2 of Sec. 11, T. 1 N., R. 12 W.

Lots 3, 4, and 5 of Sec. 11, T. 1 N., R. 12 W.

Lot 4 of Sec. 13, T. 1 N., R. 12 W.

Lots 1 and 2 of Sec. 13, T. 1 N., R. 12 W.

Lots 1, 2 and 3, of Sec. 3, T. 1 N., R. 14 W.

S.E. 1/4 of N.W. 1/4; S.W. 1/4 of N.E. 1/4; and N.E. 1/4 of S.W. 1/4 of Sec. 3, T. 1 N., R. 14 W.

The S.W. 1/4 of N.W. 1/4 and Lots 4 and 5 of Sec. 3, T. 1 N., R. 14 W.

The S.E. 1/4 of Sec. 3, T. 1 N., R. 14 W.

The W. 1/2 of S.W. 1/4 and S.E. 1/4 of S.W. 1/4 of Sec. 3, T. 1 N., R. 14 W.

Lots 1 and 2 of Sec. 5, T. 1 N., R. 14 W.

The frac. N. 1/2 of Sec. 9, T. 1 N., R. 14 W.

The frac. S. 1/2 of Sec. 9, T. 1 N., R. 14 W.

The W. 1/2 of N.W. 1/4 and Lots 1, 2, 3, & 4 of Sec. 11, T. 1 N., R. 14 W.

Lot 1 of Sec. 15, T. 1 N., 14 W.

Lots 1, 2, 3, and 4 of Sec. 27, T. 1 N., R. 14 W.

The frac. S.W. 1/4 of Sec. 31, T. 1 N., R. 14 W.

The frac. S.E. 1/4 of Sec. 31, T. 1 N., R. 14 W.

The S. 1/2 of S.W. 1/4 and Lots 1 & 2 of Sec. 33, T. 1 N., R. 14 W.

The S. 1/2 of S.E. 1/4 and Lots 3 and 4 of Sec. 33, T. 1 N., R. 14 W.

The E. 1/2 of Sec. 35, T. 1 N., R. 14 W.

The N.W. 1/4 of Sec. 3, T. 3 N., R. 19 W.

The E. 1/2 of N.E. 1/4 of Sec. 5, T. 3 N., R. 19 W.

The N. 1/2 of S.E. 1/4; S.W. 1/4 and N. 1/2 of Sec. 15, T. 4 N., R. 19 W.

The S. 1/2 of S. E. 1/4 of Sec. 15, T. 4 N., R. 19 W.

The E. 1/2 of N.E. 1/4 and E. 1/2 of S.E. 1/4 of Sec. 17, T. 4 N., R. 19 W.

The N. 1/2 and S.W. 1/4 of Sec. 21, T. 4 N., R. 19 W.

The S.E. 1/4 of Sec. 21, T. 4 N., R. 19 W.

The N.W. 1/4 of Sec. 23, T. 4 N., R. 19 W.

The S.W. 1/4 of Sec. 23, T. 4 N., R. 19 W.

The N.W. 1/4 of N.W. 1/4 of Sec. 25, T. 4 N., R. 19 W.

The N.W. 1/4 of S.E. 1/4; E. 1/2 of S.W. 1/4 and S.W. 1/4 of S.W. 1/4 of Sec. 25, T. 4 N., R. 19 W.

The E. 1/2 of S.E. 1/4 of Sec. 25, T. 4 N., R. 19 W.

The N.E. 1/4 of Sec. 27, T. 4 N., R. 19 W.

The N.E. 1/4 of N.W. 1/4 and W. 1/2 of N.W. 1/4 of Sec. 27, T. 4 N., R. 19 W.

The S.E. 1/4 of N.W. 1/4 of Sec. 27, T. 4 N., R. 19 W.

The E. 1/2 of N.E. 1/4 and N.E. 1/4 of S. E. 1/4 of Sec. 29, T. 4 N., R. 19 W.

The S.E. 1/4 of N.E. 1/4 of Sec. 22, T. 4 N., R. 19 W.

Lots 2, 3 and 4 of Sec. 33, T. 4 N., R. 19 W.

The E. 1/2 of S.E. 1/4 of Sec. 33, T. 4 N., R. 19 W.

The N. 1/2 of Sec. 7, T. 7 N., R. 13 W.

All of frac. Sec. 1, T. 7 N., R. 14 W.

All of frac. Sec. 3, T. 7 N., R. 14 W.

All of frac. Sec. 5, T. 7 N., R. 14 W.

The W. 1/2 of Sec. 7, T.7 N., R. 14 W.

The N. 1/2 of Sec. 9, T. 7 N., R. 14 W.

The N. 1/2 of Sec. 11, T. 7 N., R. 14 W.

All of Sec. 1, T. 7 N., R. 15 W.

The N. 1/2 of Sec. 3, T. 7 N., R. 15 W.

The N.W. 1/4 and Lot 2 of Sec. 5, T. 7 N., R. 15 W.

San Bernardino Base and Meridian.

And, excepting, also, the following described lands which it is adjudged were, prior to the commencement of this suit, sold by the defendant Southern Pacific Railroad Company to third persons, who purchased the same in good faith and for value, and as to which lands it is adjudged that the United States take nothing, which lands are described as follows, to wit:

The frac. N. 1/2 of Sec. 7, T. 7 N., R. 18 W.

The N. 1/2 of Sec. 9, T. 7 N., R. 18 W.

The N. 1/2 of N.E. 1/4 and S.W. 1/4 of N.E. 1/4 of Sec. 1, T. 8 N., R. 14 W.

The N.W. 1/4 of Sec. 1, T. 8 N., R. 14 W.

The N.W. 1/4 of S.E. 1/4 of Sec. 1, T. 8 N., R. 14 W.

The S.W. 1/4 of Sec. 1, T. 8 N., R. 14 W.

The N.E. 1/4 of Sec. 3, T. 8 N., R. 14 W.

The N.W. 1/4 of Sec. 3, T. 8 N., R. 14 W.

The SE. 1/4 of Sec. 3, T. 8 N., R. 14 W.

The S.W. 1/4 of Sec. 3, T. 8 N., R. 14 W.

The N. 1/2 of N.E. 1/4 of Sec. 5, T. 8 N., R. 14 W.

The N. 1/2 of N.W. 1/4 of Sec. 5, T. 8 N., R. 14 W.

The N. 1/2 of S.W. 1/4; S.E. 1/4 and N. 1/2 of Sec. 11, T. 8 N., R. 14 W.

The N.E. 1/4 of Sec. 1, T. 8 N., R. 16 W.

The N.W. 1/4 of Sec. 1, T. 8 N., R. 16 W.

The S.E. 1/4 of Sec. 1, T. 8 N., R. 16 W.

The S.W. 1/4 of Sec. 1, T. 8 N., R. 16 W.

The N.E. 1/4 of Sec. 3, T. 8 N., R. 16 W.

The N.W. 1/4 of Sec. 3, T. 8 N., R. 16 W.

The S.E. 1/4 of Sec. 3, T. 8 N., R. 16 W

The SW, 1/4 of Sec: 3, T: 8 N , R: 16 W:

The N.E. 1/4 of Sec. 3, T. 8 N., R. 16 W.

The N.W. 1/4 of Sec. 5, T. 8 N., R. 16 W.

The S.E. 1/4 of Sec. 5, T. 8 N., R. 16 W.

The S.W. 1/4 of Sec. 5, T. 8 N., R. 16 W.

All of Sec. 11, T. 8 N., R. 16 W.

The N.W. 1/4 of Sec. 13, T. 8 N., R. 16 W.

The S.E. 1/4 of Sec. 13, T. 8 N., R. 16 W.

The N. 1/2 of S.W. 1/4 and S.E. 1/4 of S.W. 1/4 of Sec. 13, T. 8 N., R. 16 W.

All of Sec. 15, T. 8 N., R. 16 W.

The N.E. 1/4 of Sec. 23, T: 8 N: R: 16 W.

The N.W. 1/4 of Sec. 23, T. 8 N., R. 16 W.

The S.E. 1/4 of Lots, 1, 2, 3, & 4 of Sec. 9, T. 8 N., R. 17 W.

Lot 1 of Sec. 27, T. 8 N., R. 17 W.

All of frac. Sec. 29, T. 8 N., R. 17, W.

All of frac. Sec. 31, T. 8 N., R. 17 W.

All of Sec. 33, T. 8 N., R. 17 W.

All of frac. Sec. 35, T. 8 N., R. 17 W.

The S.W. 1/4 of S.W. 1/4 and Lots 1, 2 & 3 of Sec. 13, T. 8 N., R. 18 W.

The N.E. 1/4 of Sec. 15, T. 8 N., R. 18 W.

The N.W. 1/4 of Sec. 15, T. 8 N., R. 18 W.

The S.E. 1/4 of Sec. 15, T. 8 N., R. 18 W.

The S.W. 1/4 of Sec. 15, T. 8 N., R. 18 W.

The SE. 1/4 of S.E. 1/4 and W. 1/2 of S.E. 1/4 of Sec, 17, T. 8 N., R. 18 W.

The E. 1/2 of Sec. 21, T. 8 N., R. 18 W.

The S.W. 1/4 of Sec. 21, T. 8 N., R. 18 W.

All of Sec. 23, T. 8 N., R. 18 W.

The N. 1/2 of S.E. 1/4; S.W. 1/4 and N. 1/2 of Sec. 7, T. 9 N., R. 13 W.

The W. 1/2 of N.W. 1/4 of Sec. 9, T. 9 N., R. 13 W.

The N.W. 1/4 of S.E. 1/4; W. 1/2 of N.E. 1/4 and W. 1/2 of Sec. 17, T. 9 N., R. 13 W.

All of Sec. 19, T. 9 N., R. 13 W.

The N.E. 1/4 of N.W. 1/4; W. 1/2 of N.W. 1/4 and N.W. 1/4 of S.W. 1/4 of Sec. 31, T. 9 N., R. 13 W.

The frac. N. 1/2 of Sec. 19, T. 9 N., R. 14 W.

The S.E. 1/4 of Sec. 19, T. 9 N., R. 14 W.

The S.W. 1/4 of Sec. 19, T. 9 N., R. 14 W.

E. 1/2 of Sec. 21, T. 9 N., R. 14 W.

The W. 1/2 of Sec. 21, T. 9 N., R. 14 W.

All of Sec. 23, T. 9 N., R. 14 W.

All of Sec. 25, T. 9 N., R. 14 W.

The N. 1/2 of Sec. 27, T. 9 N., R. 14 W.

The 1/2 of Sec. 29, T. 9 N., R. 14 W.

The S. 1/2 of Sec. 29, T. 9 N., R. 14 W.

The E. 1/2 of Sec. 31, T. 9 N., R. 14 W.

The N.W. 1/4 of Sec. 31, T. 9 N., R. 14 W.

The S.W. 1/4 of Sec. 31, T. 9 N., R. 14 W.

The N. 1/2 of Sec. 33, T. 9 N., R. 14 W.

The S. 1/2 of Sec. 33, T. 9 N., R. 14 W.

All of Sec. 35, T. 9 N., R. 14 W.

The N.E. 1/4 of Sec. 17, T. 9 N., R. 15 W.

The S.E. 1/4 of Sec. 17, T. 9 N., R. 15 W.

The N.W. 1/4 of Sec. 17, T. 9 N., R. 15 W.

The S.W. 1/4 of Sec. 17, T. 9 N., R. 15 W.

The N.E. 1/4 of Sec. 19, T. 9 N., R. 15 W.

The N.W. 1/4 of Sec. 19, T. 9 N., R. 15 W.

The S.E. 1/4 of Sec. 19, T. 9 N., R. 15 W.

The S.W. 1/4 of Sec. 19, T. 9 N., R. 15 W.

The S. E. 1/4 of Sec. 21, T. 9 N., R. 15 W.

The S.W. 1/4 of Sec. 21, T. 9 N., R. 15 W.

The N. 1/2 of Sec. 23, T. 9 N., R. 15 W.

The S. 1/2 of Sec. 23, T. 9 N., R. 15 W.

The N.E. 1/4 of Sec. 25, T. 9 N., R. 15 W.

The N.W. 1/4 of Sec. 25, T. 9 N., R. 15 W.

The S.E. 1/4 of Sec. 25, T. 9 N., R. 15 W.

The S.W. 1/4 of Sec. 25, T. 9 N., R. 15 W.

The N. 1/2 of Sec. 27, T. 9 N., R. 15 W.

The S. 1/2 of S.W. 1/4 and S.E. 1/4 of Sec. 27, T. 9 N., R. 15 W.

The N.E. 1/4 of Sec. 35, T. 9 N., R. 15 W.

The N. 1/2 of N.W. 1/4 of Sec. 35, T. 9 N., R. 15 W.

The N.E. 1/4 of Sec. 13, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 13, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 13, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 13, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 19, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 19, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 19, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 19, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 21, T. 9 N., R. 16 W.

The N. W. 1/4 of Sec. 21, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 21, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 21, T. 9 N., R. 16 W.

The N. 1/2 of Sec. 23, T. 9 N., R. 16 W.

The N.E. 1/4 of S.E. 1/4 of Sec. 23, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 25, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 25, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 25, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 25, T. 9 N., R. 16 W.

The N. E. 1/4 of Sec. 27, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 27, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 27, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 27, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 29, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 29, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 29, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 29, T. 9 N., R. 16 W.

The N.E 1/4 of Sec. 31, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 31, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 33, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 33, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 33, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 33, T. 9 N., R. 16 W.

The N.E. 1/4 of Sec. 35, T. 9 N., R. 16 W.

The N.W. 1/4 of Sec. 35, T. 9 N., R. 16 W.

The S.E. 1/4 of Sec. 35, T. 9 N., R. 16 W.

The S.W. 1/4 of Sec. 35, T. 9 N., R. 16 W.

Lots 1, 2, 3, and 4 of Sec. 33, T. 9 N., R. 17 W.

San Bernardino Base and Meridian.

And it is further ordered, adjudged and decreed, that this decree shall not affect any right which the

United States may have to recover from the defendant Southern Pacific Railroad Company the proper government price for any of the aforesaid lands sold by the said company to third persons; nor shall it cancel or vacate any patent issued by the United States to the said Southern Pacific Railroad Company for lands sold by it to a bona fide purchaser.

It is further ordered, adjudged and decreed that this decree shall not in any wise affect any right of way which the defendant, Southern Pacific Railroad Company may have over, upon and across any of the lands described in this decree, to the extent of one hundred (100) feet in width on each side of its railroad, including all necessary ground for station buildings, work-shops, depots, machine-shops, switches, sidetracks, turntables, and water stations, now properly appropriated and used by the said company for said purposes.

And it is further ordered, adjudged and decreed, that the United States have and recover their costs of this suit taxed at one hundred and eighty and 50/100 (180 50/100) dollars.

ROSS,
Circuit Judge.

Decree entered and recorded June 6th, 1898.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 600. United States, vs. Southern Pacific R. R. Co., et al. Decree. Filed Jun. 6, 1898. Wm. M. Van Dyke, Clerk. Joseph H. Call, Spl. U. S. Atty.

No. 600.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS, and HOMER S. KING, Trustees; and the CENTRAL TRUST COMPANY OF NEW YORK,

Defendants.

Decree Filed July 2, 1902, in Case No. 600.

This cause coming on for final decree this 2nd day of July, 1902, in open court, in pursuance to a mandate issued by the Supreme Court of the United States, on the 19th day of March, 1902, and the United States appearing by Mr. Joseph H. Call, special assistant United States attorney, and the defendants appearing by Mr. William F. Herrin and Mr. William Singer, Jr., their counsel and attorney,

respectively; and the Court being duly advised in the premises, it is by the Court now

Ordered, adjudged and decreed, that the United States is the owner by title in fee simple, absolute and unincumbered, of an equal undivided moiety of the following described lands, and defendants, Southern Pacific Railroad Company, and D. O. Mills, and Homer S. King, as trustees, and the Central Trust Company of New York as trustee, and their servants, agents and successors in interest hereby are forever enjoined and restrained from having or claiming to have any title, interest, or estate adverse to the United States in and to said moiety in said lands of which the United States is the owner, as aforesaid, to wit: In all alternate sections of land, designated by odd numbers, within the primary or place limits of the grant to the Atlantic and Pacific Railroad Company, within the State of California, made by the act of Congress approved July 27, 1866, as fixed by map of definite location of said company, filed in the office of the Commissioner of the General Land Office in the year one thousand eight hundred and seventy-two, so far as those limits conflict with the primary or place limits of the grant to the Southern Pacific Railroad Company made by said act of Congress of July 27, 1866, and acts amendatory thereof, as adjusted to the line of road shown upon

the maps filed in the Interior Department on January 7, 1885, and accepted by the Secretary of the Interior on September 8, 1897; excepting therefrom all such sections and parts of sections of land designated by odd numbers as fall within the following described townships and parts of townships to wit: townships three (3) and four (4) north, ranges five (5), six (6) and seven (7) west; township one (1) north, ranges sixteen (16), seventeen (17) and eighteen (18) west; townships six (6) and south three-fourths of township seven (7) north, ranges eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), and nineteen (19), west; also townships from number two (2) north to number five (5) north, both numbers included, and ranges from number eight (8) west to number eighteen (18) west, both numbers included, San Bernardino base and meridian, California, as to which excepted lands no relief is sought by this bill; and it is further

Ordered, adjudged and decreed, that as to all other lands embraced by the bill, that the bill be, and hereby is, dismissed without prejudice to any further suit or action, and it is further

Ordered, adjudged and decreed, that the respective parties plaintiff and defendant pay their own costs.

July 2d, 1902.

ROSS,
Circuit Judge.

Decree entered and recorded July 2d, 1902.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 600. U. S. Circuit Court, 9th Circuit, Southern District of Cala. United States of America vs. Southern Pacific Railroad Co., et al. Final Decree. Filed Jul. 2, 1902. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., N. E. Corner Second and Mission Streets, San Francisco, Cal., Atty. for ————.

Clerk's Certificate to Judgment-Roll in Case No. 600.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States for the Southern District of California, do hereby certify the foregoing 64 typewritten pages numbered from 1 to 64, both numbers inclusive, to be a full, true and correct copy of the following papers of record in the cause entitled The United States of America, Complainant, vs. The Southern Pacific Railroad Company, et al., No. 600, viz.: Bill of complaint, filed May 14th, 1894; answer to bill of complaint, filed January 10th, 1895; replication, filed January 23d, 1895; decree, filed June

6th, 1898, and final decree pursuant to mandate of the Supreme Court of the United States, filed July 2d, 1902, as the same appear on file and of record in my office.

Attest my hand and the seal af said Circuit Court, this 30th day of December, 1905.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: Filed May 24, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,
Complainant and Appellee,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,
Defendants and Appellants.

Petition for Appeal.

The defendants, Southern Pacific Railroad Company, D. O. Mills and Homer S. King as trustees,

and Central Trust Company of New York as trustee, conceiving themselves aggrieved by the decree made and entered herein on March 18th, 1907, appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in their assignment of errors, filed herewith.

The said defendants pray that their appeal be allowed; and that upon this Court's approval of a good and sufficient bond to be given by them (these defendants), all proceedings in this cause, and upon the said decree, be stayed, pending this appeal.

Dated May ———, 1907.

WM. SINGER, JR.,
Attorney for the Defendants.

WM. F. HERRIN,
Counsel for the Defendants.

Order Allowing Appeal.

The foregoing claim of appeal, and prayer for supersedeas, are allowed and granted; the supersedeas to take effect upon the filing of a good and sufficient bond, approved by this Court, in the sum of $500, conditioned that the defendants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good.

It is further ordered that a true copy of the record, this petition and order, the assignment of errors filed therewith, and of all other papers and proceedings in the case, be sent to the said United States Circuit

Court of Appeals, under the seal of this Court and the hand of the Clerk thereof.

So ordered, on May 17th, 1907.

ROSS,
Circuit Judge.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States vs. Southern Pacific Railroad Co. et al. Petition and Order Granting Appeal of Defendants. Filed May 17, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., Attorney for Defendants. Room 842, Flood Building, San Francisco.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,
Complainant and Appellee,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,
Defendants and Appellants.

Assignment of Errors.

The defendants, Southern Pacific Railroad Company, D. O. Mills and Homer S. King as trustees,

Central Trust Company of New York as trustee, by their undersigned attorney and counsel, in connection with their petition and appeal herein, say that the decree rendered and entered by the said Court on March 18th, 1907, in the above-entitled case No. 1196, is erroneous and against their just rights in the following particulars:

1st. The Court erred in adjudging or decreeing that complainant is owner, by title absolute and in fee or at all, of the lands described in the said decree, or any part thereof; and herein

(a) The Court erred in adjudging or decreeing that these defendants have not, nor has either of them, any right, title, estate or interest in, or lien upon, the said lands; and

(b) The Court erred in ordering these defendants, or any of them, enjoined or restrained from asserting or claiming any right, title, estate or interest in, or lien upon, the said lands, adverse to complainant.

2d. The Court erred in decreeing or ordering cancellation or annulment of the patent issued by the United States unto the defendant Southern Pacific Railroad Company, for said lands.

3d. The Court erred in ordering that complainant have and recover from the defendant Southern Pacific Railroad Company, its costs herein.

4th. The Court erred in not deciding and decreeing that

(a) The patent from the United States unto defendant Southern Pacific Railroad Company, for the lands described in the decree, was lawfully issued, and is valid; and

(b) The defendants D. O. Mills and Homer S. King as trustees, are bona fide purchasers of the said lands; and

(c) The defendant Central Trust Company of New York as trustee, is a bona fide purchaser of the said land, subject to the mortgage of April 1st, 1875, by Southern Pacific Railroad Company unto D. O. Mills and Lloyd Tevis as trustees.

5th. The Court erred in not ordering complainant's bill of complaint dismissed, at complainant's cost.

WM. SINGER, JR.,
Attorney for the Defendants.

WM. F. HERRIN,
Counsel for the Defendants.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States vs. Southern Pacific Railroad Co. et al. Assignment of Errors. Filed May 17, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., Attorney for Defendants. Room 842, Flood Building, San Francisco.

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

No. 1196.

UNITED STATES,

Complainant and Appellee,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY et al.,

Defendants and Appellants.

Bond on Appeal.

We, Walter F. Parker and A. M. Jamison, both of Los Angeles County, California, are held and firmly bound to pay unto the United States, as complainant above-named, the sum of five hundred ($500.00) dollars; for payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The defendants, Southern Pacific Railroad Company, D. O. Mills and Homer S. King as trustees, and Central Trust Company of New York as trustee,

have been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a supersedeas, from the decree entered in the above-mentioned cause on March 18th, 1907; and the condition of this obligation is, that if the defendants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their said appeal good, then this obligation shall be void—otherwise to remain in full force.

Signed and sealed on May 17th, 1907.

WALTER F. PARKER. [Seal]
A. M. JAMISON. [Seal]

State of California,
County of Los Angeles,—ss.

Walter F. Parker and A. M. Jamison, being duly sworn, each for himself says: I am one of the sureties on the foregoing bond, and subscribed my name thereto. I am a resident and freeholder within the county of Los Angeles, State of California, and am worth the sum of five hundred ($500.00) dollars, over and above my just debts and liabilities, in property within the said county which is not exempt from execution.

WALTER F. PARKER.
A. M. JAMISON.

Subscribed and sworn to before me on May 17th, 1907.

[Seal] M. I. DAVIS,
Notary Public in and for Los Angeles County, California.

The foregoing bond approved, on May 17th, 1907.

ROSS,
Circuit Judge.

[Endorsed]: No. 1196. U. S. Circuit Court, Southern District of California, Southern Division. United States vs. Southern Pacific Railroad Co. et al. Bond on Appeal. Filed May 17, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Wm. Singer, Jr., Attorney for Defendants. Room 842, Flood Building, San Francisco.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1196.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), D. O. MILLS and HOMER S. KING, Trustees, the CENTRAL TRUST COMPANY OF NEW YORK, Trustee, and JACKSON ALPHEUS GRAVES,
Defendants.

Clerk's Certificate to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing three hundred and twenty-two (322) typewritten pages numbered from 1 to 322 inclusive, and comprised in one (1) volume, to be a full, true, and correct copy of the record and pleadings, opinion of the Court, and of all proceedings and papers upon which the final decree entered on the 18th day of March, 1907,

was made, and also of the assignment of errors, petition for and order allowing appeal in the above and therein entitled cause, and that the same, together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in said cause.

I do further certify that the cost of the foregoing record is $195.05/100, the amount whereof is to be paid me by the Southern Pacific Railroad Company, one of the appellants in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California, this 13th day of August, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 1492. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Railroad Company, D. O. Mills and Homer S. King as Trustees, and Central Trust Company of

New York as Trustee, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

Filed August 17, 1907.

F. D. MONCKTON,
Clerk.

CASE No. 1492.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., ET AL.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' BRIEF.

WM. SINGER, JR.,
Attorney for the Appellants.

W. F. HERRIN,
Counsel for the Appellants.

CASE No. 1492.

UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants and Appellants,
vs.
UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' BRIEF.

This is an appeal from a decree of the United States Circuit Court of Los Angeles, in a suit brought to cancel a patent issued by the United States unto the defendant Southern Pacific Railroad Company, for lands within the indemnity limits, and selected under the indemnity provisions, of the Railroad Company's (so-called) "Branch-Line" grant.

The patent complained of is for two separate tracts: one within primary limits, the other within indemnity limits, of the forfeited Atlantic & Pacific grant; and, as before said, both tracts are within indemnity limits of the Southern Pacific "Branch-Line" grant.

The principal purpose of the suit is to test the Southern Pacific Railroad Company's right to select, under

indemnity provisions of its "Branch-Line" grant, lands within that part of its "Branch-Line" indemnity grant which is overlapped by the forfeited Atlantic & Pacific grant.

The decision on this appeal depends on the true answer to the question: *Is the Southern Pacific Railroad Company entitled to select, under the indemnity provisions of its "Branch-Line" grant, public land found restored to the public domain at the time of selection, but which at some former time was covered by the (forfeited) Atlantic & Pacific grant?*

STATEMENT OF THE CASE.

Section 3 of the Act of Congress of July 27, 1866, (**14 Stat. 292**), made a grant of lands unto the Atlantic & Pacific Railroad Company, to aid in the construction of a contemplated railroad from Springfield, Missouri, to the Pacific Ocean. The Atlantic & Pacific Railroad Company filed in the Department of Interior maps which were accepted as definitely locating the whole line of its contemplated railroad, but did not construct any part of the section thereof located in the State of California; and on July 6, 1886, an Act of Congress was passed (**24 Stat. 123**) forfeiting and restoring to the public domain all lands granted to that Company in the State of California. *(Tr. 75, Items 7 and 8.)*

Section 23 of the Act of Congress of March 3, 1871 (**16 Stat. 573**), made unto the Southern Pacific Railroad Company a grant of lands to aid in the construc-

tion of a railroad from Yuma via Los Angeles to Mojave; which grant has been fully earned, by construction and acceptance of the railroad. This grant is known as the "Branch-Line" grant. *(Tr. 89, Items 33 and 34.)*

One tract of land in suit is within primary, the other within indemnity, limits of the forfeited Atlantic & Pacific grant; and both tracts are within indemnity limits of the Southern Pacific "Branch-Line" grant. *(Tr. 92, Items 35 and 36.)*

The patent sought to be canceled was issued on June 30, 1903, pursuant to the Southern Pacific Railroad Company's Branch-Line indemnity selection thereof made on November 10, 1902 *(Tr. 93, Item 37);* which selection, it will be observed, was made six years after the Atlantic & Pacific forfeiture Act restored the selected land to the public domain.

It is stipulated that the selection was made in due form *(Tr. 93, Item 37);* and it may be fairly stated as agreed that the selection was lawful and valid unless barred by the fact that, prior to the forfeiture Act of 1886, the land was within limits of the Atlantic & Pacific grant.

On behalf of the United States it is claimed that (1) on principle, the Southern Pacific is not entitled to select, under indemnity provisions of its Branch-Line grant, any lands of the forfeited Atlantic & Pacific grant; and that (2) it has been so finally decided in suits similar to this, between the same parties, reported in 146 U. S. 570, 146 U. S. 615, 168 U. S. 1, and 183 U. S. 519.

Our contentions, on behalf of the defendants, are, that

I. The defendant Railroad Company's right to select the lands in suit *depended on the status thereof, as public lands, at date of selection,* irrespective of their status at some former time; hence, the lands in suit being public lands at the time of selection, the selection under consideration was lawfully made.

II. It has not been held in any of the decisions introduced or relied on in behalf of the United States, that the defendant Railroad Company is not entitled to select as indemnity, lands within limits of the forfeited Atlantic & Pacific grant.

ARGUMENT.

I.

THE RAILROAD COMPANY'S RIGHT TO SELECT THE LANDS IN SUIT DEPENDED ON THE STATUS THEREOF, AS PUBLIC LANDS, AT DATE OF SELECTION, IRRESPECTIVE OF THEIR STATUS AT SOME FORMER TIME; HENCE, THE LANDS BEING PUBLIC LANDS AT THE TIME OF SELECTION, THE SELECTION UNDER CONSIDERATION WAS LAWFULLY MADE.

(a). The case of **Ryan vs. C. P. R. R. Co., 99 U. S. 382,** is on all fours with the case at bar. The land in controversy, in the Ryan case, was within the indemnity limits of the grant made by the Act of Congress of July 25, 1866 (14 Stat. 239), to aid in construction of the California & Oregon railroad, from a point on the Central Pacific railroad, about twenty miles north of Sacramento, to the north boundary line of California. At the date of grant, and date of definite location of the contemplated railroad, the land in suit was within the claimed limits of a Mexican Grant—hence was not pub-

lic land at either of those dates; but thereafter, and prior to indemnity selection by the Railroad Company, the Mexican Grant claim was finally adjudged invalid, and the lands covered by it were restored to the public domain. About a year after the final decree adjudging the Mexican Grant claim invalid, the Railroad Company made indemnity selection of the land; and the decision of the case turned on the right of the Railroad Company to make such indemnity selection. The Supreme Court held that, notwithstanding the rights of the Railroad Company attached to lands within primary limits of its grant, if at all, at date of definite location (hence the Railroad Company's right to primary limits lands of its grant depended on the status thereof as public land at date of the granting Act and definite location), the Railroad Company's right to select lands within the indemnity limits of its grant depended on the status thereof, as public land, at the date of selection.

The Supreme Court, in the Ryan case, very clearly distinguished it from Newhall vs. Sanger (92 U. S. 761), where primary lands of the Railroad Company were within claimed limits of a similar Mexican Grant at the date of railroad grant and definite location; which Mexican Grant claim, although finally adjudged invalid soon after railroad definite location, was held to prevent the passage of title under the Railroad Grant, to primary, or granted, lands thereof. At page 388 of its decision in the Ryan case, the Supreme Court said:

> "It was within the secondary, or indemnity territory where that deficiency was to be supplied. The

> Railroad Company had not, and could not have, any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd-sections originally given failed to meet its requirements. *When so selected there was no Mexican Grant or other claim impending over it. It had ceased to be sub judice, and was no longer in litigation. It was as much 'public land' as any other part of the national domain.* The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. *The Mexican claim, when condemned, lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed.* In this state of things the Railroad Company acquired its title, and that title is indefeasible."

So it is in the case at bar. From the time the lands were restored to the public domain by the Atlantic & Pacific forfeiture Act, they remained "as much 'public land' as any other part of the public domain"; and under the ruling in the Ryan case, the Railroad Company's indemnity territory stood, after the forfeiture Act, entirely unaffected by the past history of the land —it was as if the Atlantic & Pacific grant "had never existed." The true question is: *What was the status of the land at the date of selection?* If then public land, otherwise free for selection, it is immaterial what past claims to it may have at some time existed. In other words, if public land, within the Company's indemnity territory, at the date of indemnity selection, it is absolutely immaterial whether the title to such land had formerly been claimed under a Mexican Grant there-

after adjudged invalid (as in the Ryan case), or under a grant from the United States to the Atlantic & Pacific Railroad Company thereafter declared forfeited (as in the case at bar).

The Ryan decision was followed in the following, among many other, Supreme Court cases: **Barney vs. Winona, 117 U. S. 228; Wisconsin Central vs. Price County, 133 U. S. 496; United States vs. Missouri, etc., Railroad, 141 U. S. 358; Hewitt vs. Schulz, 180 U. S. 139; S. P. R. R. Co. vs. Bell, 183 U. S. 675.**

These decisions firmly establish the rule, first announced in the Ryan case, that *the right of indemnity selection depends on the status of the land as public land at the date of selection,* irrespective of its status at some former time.

(b). Since the decision by the Supreme Court in the Ryan case, the Interior Department has uniformly followed its ruling.

In **Bright vs. Nor. Pac. R. R. Co., 6 L. D. 615,** the Secretary of Interior said:

> "It has been repeatedly held by the courts and this department that the Company can acquire no right to indemnity lands prior to selection thereof, and that the status of such lands at the date of application to select must govern the determination of conflicting claims. Prest vs. Nor. Pac. R. R. Co., 2 L. D. 506; St. Paul M. & M. Ry. Co. vs. Bond, 3 L. D. 50; S. P. R. R. Co. vs. Reed, 4 L. D. 256; Brady vs. S. P. R. R. Co., 5 L. D. 658; Ryan vs. Railroad Co., 99 U. S. 382."

The foregoing decision is followed, and the same

rule announced, in **Missouri K. & T. Ry. Co. vs. Beal, 10 L. D. 504; Hensley vs. Missouri K. & T. Ry. Co., 12 L. D. 19; Hastings & Dakota Ry. Co. vs. St. Paul Ry. Co., 13 L. D. 535; Nor. Pac. R. R. Co. vs. Lumis, 21 L. D. 395; South & North Ala. R. R. Co. vs. Hull, 22 L. D. 273; S. P. R. R. Co. vs. McKinley, 22 L. D. 493.**

In the case of **Allers vs. Nor. Pac. R. R. Co., 9 L. D. 452** (decided in 1389), Secretary Noble held that

> "A tract is not excluded from indemnity selection by reason of its being within the primary limits of another grant, if it is in fact vacant public land at date of selection, and otherwise subject to such appropriation."

In **Nor. Pac. R. R. Co. vs. Halverson, 10 L. D. 15** (in 1890), the same Secretary held that

> "The right to select indemnity land is not defeated by the fact that the land is within the primary limits of another grant, if the land is excepted from such grant and vacant public land at date of selection."

In **Nor. Pac. R. R. Co. vs. Moling, 11 L. D. 138** (1890) the same Secretary held that

> "The right to select a tract as indemnity under a railroad grant is not defeated by the mere fact that the selection is within the primary limits of another grant, if the tract is vacant public land at date of selection."

In **Nor. Pac. R. R. Co. vs. Bass, 13 L. D. 535** (1891), Acting Secretary Chandler held that

> "The mere fact that the tract is within the geographical limits of another grant will not defeat the

right to select the same as indemnity, if it is otherwise subject to selection."

Secretary of Interior Smith, in **St. Paul M. & M. Ry. Co. vs. Munz, 17 L. D. 288** (1893), held that

"A tract of land within the primary limits of one grant and the indemnity limits of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection."

In re **St. Paul M. & M. Ry. Co., 25 L. D. 545,** the Secretary of Interior held that

"The occupancy of town lots under a scrip location should not be held such an adverse claim, or right, as will defeat the right of selection under the Act of August 5, 1892, where at the date of such selection the scrip has been withdrawn, and the occupants and purchasers thereunder disclaim any interest adverse to the Company."

Again, in **Or. & Cal'a R. R. Co. vs. Crewdson, 29 L. D. 440,** the Secretary of Interior held as follows:

"Odd-numbered sections within the indemnity limits of the grant made by the Act of July 25, 1866, and also within the overlap of that portion of the prior grant for the Northern Pacific road via the valley of the Columbia River, which was never definitely located or constructed and the grant for which was forfeited by the Act of September 29, 1890, are subject to indemnity selection under said grant of 1866, so far as any claim under the Northern Pacific grant is concerned."

In **Hensley vs. Mo. Kansas & Tex. Ry. Co., 12 L. D. 19,** the Secretary held that

> "Land excepted from withdrawal by the existence of a pre-emption claim, is not excluded thereby from subsequent selection, if at the date thereof such claim has expired or is abandoned."

In **New Orleans & Pac. Ry. Co. vs. Perkins, 16 L. D. 65,** the Secretary of Interior held that

> "The outstanding certification of lands to the State under the grant of June 3, 1856, did not prevent re-investment of title in the United States by the forfeiting Act of July 14, 1870, and is therefore no bar to the selection of such lands as indemnity after the passage of said Act."

Again, in **Scanlin vs. New Orleans & Pac. Ry. Co., 27 L. D. 274,** the Secretary of Interior held that

> "The Act of July 14, 1870, forfeiting the grant of June 3, 1856, in aid of the New Orleans and Opelousas road, operated to restore lands embraced in said grant and certified thereunder, to the public domain, without a formal act of conveyance on the part of the State; so, after such statutory restoration, the right acquired by said certification was no bar to the selection of indemnity lands by the New Orleans & Pacific."

Under the settled rule, therefore, of the United States Supreme Court and the Interior Department, the Southern Pacific Railroad Company's indemnity selection of the lands in this suit were lawfully made, and are valid.

II.

IT HAS NOT BEEN HELD IN ANY OF THE DECISIONS INTRODUCED OR RELIED ON IN BEHALF OF THE UNITED STATES, THAT THE RAILROAD COMPANY IS NOT ENTITLED TO SELECT AS INDEMNITY, LANDS WITHIN LIMITS OF THE FORFEITED ATLANTIC & PACIFIC GRANT.

There were introduced in evidence on behalf of the United States, against our objection, copies of parts of the records on file in the office of the Clerk of this Court, of the cases familiarly known as No. 67-68-69, No. 184, and No. 600, wherein the United States was plaintiff and the Southern Pacific Railroad Company (with others) was defendant; the final decisions of which cases are reported in (a) 146 U. S. 570, (b) 146 U. S. 615, (c) 168 U. S. 1, and (d) 183 U. S. 519.

Those decisions do not, nor does any one of them, hold that the Southern Pacific Railroad Company is not entitled to select land within over-lap of the forfeited Atlantic & Pacific grant upon indemnity limits of its Branch-line grant.

(a) In the **146 U. S. 570** case the lands were all in *primary limits* common to the Atlantic & Pacific and Southern Pacific Branch-line grants (146 U. S. 592); hence there was not, and could not have been, any decision in that case as to indemnity rights of the Southern Pacific. After holding that the Atlantic & Pacific maps were sufficient, as maps of definite location, to attach its land-grant, the Court applied the rule of title with priority of grant—a familiar rule, settled and established long before.

(b) Nor could there have been any decision as to Southern Pacific indemnity rights in the **146 U. S. 615** case; for the lands of that case were all in *primary limits* of the Southern Pacific grant. (146 U. S. 618.)

(c) The decision in **168 U. S. 1,** after stating what was decided in the 146 U. S. cases, and holding that all questions before the Court (in 168 U. S. case) were rendered *res judicata* by those former decisions (146 U. S.), decided "here as there" (168 U. S. 62, 2d par.), without discussing or considering indemnity rights of the defendant Railroad Company.

The case decided in 168 U. S. 1 did, it is true, embrace certain lands claimed by the defendant Railroad Company under the indemnity provisions of its Branch-line grant; from which fact it is contended that the said decision is conclusive here as a final determination that the Southern Pacific Railroad Company is not entitled to its Branch-line indemnity lands lying within limits of the forfeited Atlantic & Pacific grant—notwithstanding the lands in this suit were not involved in the 168 U. S. case.

A decision in the 168 U. S. case against the Defendant Railroad Company's right to select lands of its Branch-line indemnity limits, after forfeiture of the over-lapping Atlantic & Pacific grant, would have reversed the ruling in the Ryan case, and the long list of decisions by the Supreme Court and Interior Department approving and following that decision; and yet the Ryan decision is not, nor are any of the decisions which approve or follow it, expressly overruled, or mentioned

at all, in the 168 U. S. decision. As was said in **Holmes vs. Or. & Cal'a R. R. Co., 7 Sawy. 399:**

> "It cannot be supposed that it was the intention to overrule long established principles without even mentioning the cases in which they were elaborately discussed and established."

(d). The case in **183 U. S. 519** (like the case in 168 U. S. 1) included lands claimed by the Southern Pacific Railroad Company under the indemnity provisions of its Branch-line grant. The decision in that case (183 U. S.), after adjudging the United States and Southern Pacific to be equal undivided owners of all lands in suit common to primary limits of the Atlantic & Pacific and Southern Pacific Main-line grants, *ordered the bill of complaint dismissed as to all other lands*—the dismissal order including all lands in suit claimed by the Southern Pacific under the indemnity provisions of its Branch-line grant.

The familiar rule that, in chancery practice, *dismissal of complainant's bill is the equivalent of judgment for defendant on merits,* is thus stated in **Freeman on Judgments, (4th Ed.), Vol. 1, Sec. 270:**

> **"Dismissal of Bill in Equity:** The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings, or in the decree of the court."

As the defendants, in the 183 case, prayed to go hence, the dismissal order is equivalent to judgment for the

defendants; and so it may be said that in so far as (if at all) the decision in 168 U. S. 1 decided against the Southern Pacific's indemnity right to forfeited Atlantic & Pacific lands, the 168 decision is reversed by the (later) 183 U. S. decision.

It is true that, in the 183 U. S. case, the bill was dismissed as to indemnity lands "without prejudice to any future suit or action"; but it must be assumed that the Supreme Court did not mean to grant permission to rebring the same suit—hence, as this is the same suit (as to the lands of this suit) brought again, the decision there is the decision here.

It is respectfully asked that the decree appealed from be reversed.

WM. SINGER, JR.,
Attorney for the Appellants.

WM. F. HERRIN,
Counsel for the Appellants.

No. 1492.

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC RAILROAD CO., et al.,
Defendants and Appellants

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

COMPLAINANT'S BRIEF.

ROBERT T. DEVLIN,
United States Attorney,

GEO. CLARK,
Assistant United States Attorney,
Counsel for Complainant and Appellee.

No. 1492.

In the

United States Circuit Court of Appeals

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SOUTHERN PACIFIC RAILROAD CO., et al.,
Defendants and Appellants

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

COMPLAINANT'S BRIEF.

Explanation of Suit.

This is a suit in equity. The bill of complaint is cast in the same general form and involves points of law and facts practically the same in character as those involved in the case of the United States of America vs. Southern Pacific Railroad Company, et al., No. 1453 on appeal in this Court. The bill refers to the same statutes passed by Congress, under which grants were made to the Atlantic and Pacific Railroad Company and to the Southern Pacific Railroad Company to aid in the construction of railways. It sets out that the grant to the Atlantic and Pacific Railroad Company was made prior to what is known as the "Branch Line" grant to the Southern Pacific Railroad Company, that the lands in controversy lie partly within the place limits and partly within the indem-

nity limits of the grant made to the Atlantic and Pacific Railroad Company, and that the grant to this company has been regularly declared forfeited. It shows that, claiming under the indemnity provisions of the Act of 1871, the so-called "Branch Line" grant, the Southern Pacific Railroad Company, subsequent to the forfeiture referred to, procured patents to the lands described in the bill of complaint.

The suit is brought by the United States to vacate these patents issued by the United States to the defendant railroad company, for the tracts of land described, to quiet the title of the United States for such lands, and to determine what, if any, of said lands have been sold to bona fide purchasers, and in case of sales to bona fide purchasers of any of said lands that such title be confirmed to the purchasers, and that an accounting be had for the value of such lands at the rate of $1.25 per acre, in accordance with the adjustment acts of Congress of March 3, 1887, and March 2, 1896.

The testimony was taken, mostly in the form of stipulations as to certain facts, but partly in the form of testimony before a special examiner.

The Bill of Complaint made the following parties defendants, the Southern Pacific Railroad Company and D. O. Mills and Homer S. King as Trustees, and the Central Trust Company of New York as Trustee.

By an amendment to the bill of complaint filed by consent of parties on November 2, 1905, the bill of complaint was amended by bringing in as a party defendant Jackson Alpheus Graves, whom the answer of the Southern Pacific Railroad Company alleged had purchased some of the lands described in the bill, and by stipulation of parties, filed November 22nd, 1905, it was agreed and stipulated "That the answer of the Southern Pacific Railroad Com-

pany and others, on file in this case, shall stand as the answer of the defendant Jackson Alpheus Graves, with the same effect as if his name had been specifically mentioned in said answer as a party answering the bill * * * that the replication of the United States to the answer shall stand to the answer of Jackson Alpheus Graves."

Statement of Facts.

It is stipulated between the parties as follows:

"SUBDIVISION V. (Trans. p. 92.)

Item 35. The North East quarter of North East quarter (NE¼ of NE¼) of Section Seven (7), in Township Six (6) North, Range Eight (8) West, San Bernardino Base and Meridian, is situated within primary limits of the land-grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3rd, 1871; but the said land is not within either primary or indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 36. The West half (W½) of Section Thirty-one (31), in Township Nine (9) North, Range Fifteen (15) West, San Bernardino Base and Meridian, is situated within indemnity limits of the land-grant made unto the Atlantic & Pacific Railroad Company by the hereinbefore mentioned Act of Congress of July 27th, 1866, and within indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the hereinbefore mentioned Act of Congress of March 3rd, 1871; but the said land is not within either primary or indemnity limits of the land-grant made unto the Southern Pacific Railroad Company by the said Act of Congress of July 27th, 1866.

Item 37. The lands described in Item 35 and Item 36 of this Stipulation as to Evidence, were patented by the

United States unto the Southern Pacific Railroad Company by patent dated June 30th, 1903, pursuant to said Company's indemnity selection thereof as indemnity lands of its said March 3rd, 1871 land-grant, by List No. 93, in due form, filed in the Los Angeles land office on November 10th, 1902.

Item 38. It appears from the records of the United States Land Office, for the Los Angeles District of California, that within the indemnity limits of the grant made to the Southern Pacific Railroad Company by the Act of Congress of March 3rd, 1871, there remains more than 50,000 acres of surveyed public land, vacant of record, embraced in odd numbered sections returned as agricultural in character, which have not been selected as indemnity by said Company, not including any lands embraced within either the granted limits or indemnity limits of the grant to the Atlantic and Pacific Railroad Company, made by the Act of Congress of July 27th, 1866."

It is thus seen that all of the tracts of land described in the bill are situated within either the primary or indemnity limits of the grant made to the Atlantic and Pacific Railroad Company of July 27th, 1866, as established by the maps of definite location filed in 1872, and it is also seen that these lands are claimed by the Southern Pacific Railroad Company under its grant of March 3rd, 1871, and that none of these lands are within the limits of the grant to the Southern Pacific Railroad Company by section 18 of the Act of Congress of July 27th, 1866.

Argument.

It is alleged in the bill of complaint in substance, that it has been finally and conclusively adjudged and determined by the Supreme Court of the United States that the Southern Pacific Railroad Company did not acquire, and could not take, under its grant of March 3rd, 1871,

any of the lands falling within either the primary or indemnity limits of the grant to the Atlantic and Pacific Railroad Company.

The final records and decrees in former litigations are in evidence in this case, and are set forth in the Transcript, and we especially rely upon the record in case No. 184, reported in 168 U. S. at pages from 1 to 66. That case, as stated by the Court in the opinion, and as stated by this Court in numerous cases, was brought for lands situated precisely as these are, that is, within the indemnity limits and within the place limits of the Atlantic and Pacific grant, falling also within the place limits or indemnity limits of the Southern Pacific grant of 1871.

The Government also introduced in evidence the decision of the Supreme Court and the final decree in the second appeal in that case in which the decision of the Supreme Court is reported in 184 U. S. at page 49, and which related to the claim of Jackson Alpheus Graves as a bona fide purchaser of certain lands claimed by him under purchase from the Atlantic and Pacific Fibre Importing and Manufacturing Company, a corporation of Great Britain.

In that case Graves claimed to be a bona fide purchaser under a foreign corporation, under the same deed mentioned in the answer of defendant companies, and under which it is alleged Graves is a bona fide purchaser of some of the tracts of land described in the bill of complaint.

The Supreme Court adjudged in that case (184 U. S. 49) that the Atlantic and Pacific Fibre Company, which will be called the "Fibre Company" for short, being a foreign corporation, was not entitled to the benefits of the adjustment acts of 1887 and 1896, and further decided that Graves, not having paid any valuable consideration

for the lands, was not a bona fide purchaser under that contract or deed, being the same contract referred to in the pleadings in this case.

No testimony has been taken by the defendants showing that Graves is a bona fide purchaser from the railroad company of the lands sold to him by the Fibre Company, holding under the railroad, and it may be assumed that he does not claim to be a bona fide purchaser of these lands in view of the decision of the Supreme Court before mentioned.

If, however, any such claim should be made, it will be fully answered by the decision of the Supreme Court in the appeal in 184 U. S. 49.

The lands involved in the present case were unpatented lands when the contract of sale was made to the Fibre Company, and when the Fibre Company sold to Graves, for it is stipulated as above stated, thereafter, that these lands were patented as late as 1902.

It has been decided by this Court, and by the Supreme Court (200 U. S. 341, 354), that the Southern Pacific Railroad Company was liable in equity to the United States as for a conversion of personal property, for the value of the lands erroneously patented to the railroad and sold by it to bona fide purchasers, and that the adjustment Acts of Congress of 1887 and 1896 had no other effect than to limit the liability of the railroad to $1.25 per acre, instead of the true value of the lands.

As none of the lands in this suit are in the hands of bona fide holders, the question here involved is as to the title, and as to the validity of the patents.

The former cases, and we would especially refer to the cases decided in 168 U. S. 1, and 200 U. S. 341, involved lands situated precisely as to the lands in the present suit. They were claimed by the Southern Pacific Railroad Com-

pany under its grant of 1871, part of them being claimed as indemnity lands, and part of them as place lands, and the railroad company had applied to select some of them, as it did in this case, and many of the lands had been erroneously patented, but in those cases, the Supreme Court, as well as the Circuit Court, vacated the patents so issued, holding that those lands were set apart for the Atlantic and Pacific Railroad Company, for another and totally distinct object of internal improvement, and that when that grant was forfeited, and the lands were retaken by the United States, they were not retaken for the benefit of the Southern Pacific, and that it could not take any of those lands.

United States vs. Southern Pacific R. R. Co., 146 U. S. 570, 619.
Southern Pacific R. R. Co. vs. United States, 168 U. S. 1,.

and on the second appeal, 184 U. S. 49.

Southern Pacific R. R. Co. vs. United States, 200 U. S. 341,

affirming 117 Fed 544, and 133 Fed. 651.

As heretofore stated, the record in the case, 168 U. S. 1, is in evidence in the present case, and is also covered by the stipulation of parties. At pages 46 and 47 the Supreme Court, in referring to the lands involved, say:

"The lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants."

The effect of the former decisions as precluding the Southern Pacific from asserting a right to these lands is reviewed in the following cases and the rule laid down that what has once been determined by a Court of competent jurisdiction under the issues of a suit cannot be again opened in the same Court or in any other Court by the parties or their privies.

Southern Pacific R. R. Co., vs. United States, 168 U. S. 1;
United States vs. California and Oregon Land Company, 192 U. S. 355.

Upon the points presented in the brief of the appellant, in addition to what we have hereinbefore set forth, we ask the Court's careful consideration of the argument presented in the brief of the cross appellant (complainant herein) in the case No. 1453 hereinbefore referred to.

It is respectfully submitted that there is no merit in the contention made by the appellant that the defendant railroad company is entitled to select lands within the limits of the forfeited Atlantic and Pacific Railroad Company grant merely because such lands were public lands at the time of the selection. The precise point has been determined against appellant's contention. The forfeiture Act was for the benefit of the complainant and not for the benefit of the Southern Pacific Railroad Company.

Respectfully submitted,

ROBERT T. DEVLIN,
United States Attorney,
GEO. CLARK,
Assistant United States Attorney,
Counsel for Complainant.

Case No. 1492.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., ET AL.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' REPLY BRIEF.

WM. SINGER, JR.,
Attorney for the Appellants.

WM. F. HERRIN,
Counsel for the Appellants.

Case No. 1492.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO., ET AL.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Complainant and Appellee.

DEFENDANTS' REPLY BRIEF

It must be borne in mind that the Company's *indemnity selection,* upon the validity of which the decision on this appeal depends, was made *six years after* the selected lands were restored to their former status as unappropriated public lands, by the Atlantic & Pacific forfeiture Act (*Tr.* 93, *Item* 37).

The argument of our "Defendants' Brief" is based upon the two contentions that (1st) on principle, the rule in the Ryan case (99 U. S. 382), and the unbroken

line of Supreme Court decisions following the Ryan case ruling, it is settled law that the validity of indemnity selection under railroad land-grants *depends on the status of the selected land at date of selection,* irrespective of its status at some former time; and that (**2nd**) the rule in the Ryan case has never been modified or reversed, *nor do any of the decisions introduced in evidence or relied on by counsel for complainant hold against the validity of this indemnity selection* at bar or any similar selection.

1st. We observe nothing in "Complainant's Brief", under reply, tending to contradict, or discredit, our above-mentioned **"1st"** contention, except in so far as (if at all) the attempted controversion of our above-mentioned **"2nd"** contention has such tendency; and so beg leave to re-call this Court's consideration to subdivision "I", pages 4 to 10, inclusive, of our "Defendants' Brief" on file herein.

2nd. Subdivision "II", pages 11 to 14, of our "Defendants' Brief", fully answers "Complainant's Brief", under reply, except in so far as it is therein said (pp. 6, 7) that the Supreme Court decision reported in 200 U. S. 341 was as to "lands situated precisely as are the lands in the present suit."

To the same erroneous statement made by the "Brief for United States" on the Circuit Court hearing of this case, the writer of this (Mr. Singer) made the following reply on pages 10 and 11 of "Defendants' Brief" on final hearing of this case in the Circuit Court; which reply is now repeated here:

"Throughout the above-mentioned Brief, counsel refers to the Supreme Court decision (200 U. S. 341) of suit No. 878 (this Court) as conclusive against the defendant Southern Pacific in this case; and on the last page of his Brief in this case counsel says that '200 U. S. 341 involved lands situated precisely as the lands in the present suit'.

In this counsel is mistaken. Suit No. 878 (200 U. S. 341) did not involve any land, not one tract of land, *within indemnity limits* of the Southern Pacific Railroad Company's Branch-line grant; as the writer of this stands ready, and offers, to show.

The decree of this Court in No. 878 embraced six tracts of land within indemnity limits of the defendant Railroad Company's Main-line grant; but, in fact, and as found by this Court in the first paragraph of 'Subdivision IV' of its decree in that case (No. 878), those six tracts are

'*within the primary or granted limits* of the grant made unto the said Southern Pacific Railroad Company by the said Act of Congress of March 3d, 1871; * * the said lands *were erroneously patented* unto the defendant Southern Pacific Railroad Company as enuring to it *under said grant of March 3d*, 1871.'

Counsel for the United States, in his 'Brief for United States', in the Court of Appeals (C. C. A. No. 956) of case No. 878, speaking of those six tracts, said (pp. 66, 67):

'It has been before mentioned in this Brief that the six tracts of land which are mentioned in Subdivision IV of the decree (record 244, 246) are situated within the indemnity limits of the grant made to the Southern Pacific Railroad Company by section 18 of the Act of Congress of July 27, 1866, and are also in the place limits of the Atlantic & Pacific grant, but were patented to the Southern Pacific as part of its grant of 1871 * *.

If those particular patents are void, it is not important whether or not the Southern Pacific might have selected those lands and might have secured

an approval of such selections under another grant, *because they were not so selected,* nor was any such selection ever approved.'

From which it clearly appears that the decision in 200 U. S. 241 did not decide, and could not have decided, any question as to *indemnity rights* of the defendant Railroad Company; nor does the decision disclose that such question was in the Court's mind.

Suit No. 878, however, did include lands of the forfeited Atlantic & Pacific grant within indemnity limits of the Southern Pacific Main-line grant; *but the decree dismissed complainant's bill as to those lands* (Sub. V)—*and there was no appeal.*''

Beyond this we beg leave to re-call the Court's attention to our ''Defendants' Brief'', on file herein; and to ask, most respectfully, that the decree appealed from be reversed.

WM. SINGER, JR.,
Attorney for Appellants.

WM. F. HERRIN,
Counsel for Appellants.

No. 1497

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLARD N. JONES AND
THADDEUS S. POTTER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

S. B. HUSTON and
M. L. PIPES,
Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLARD N. JONES AND
THADDEUS S. POTTER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

On the second day of September, 1905, there was returned in the Circuit Court of the United States for the District of Oregon, an indictment against Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, charging them with the violation of Sec. 5440 of the Revised Statutes

of the United States. Said indictment is as follows:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Of the April Term, in the Year of Our Lord Nineteen Hundred and Five.

UNITED STATES OF AMERICA,

v.

WILLARD N. JONES,
THADDEUS S. POTTER,
IRA WADE,
JOHN DOE, and
RICHARD ROE.

INDICTMENT: Violation of Section 5440, R. S., as amended by Act of May 17, 1879.

DISTRICT OF OREGON—SS.

The Grand Jurors of the United States of America, chosen, selected and sworn within and for the District of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present:

That Willard N. Jones, Thaddeus S. Potter and Ira Wade, each late of the State of Oregon, in the District aforesaid, and John Doe and Richard Roe, whose true names are to the Grand Jurors unknown, did, on the third day of September, in the year of our Lord nineteen hundred and two, at and in said State and District of Oregon, and within the jurisdiction of this Court, unlawfully conspire, combine, confederate and agree together, knowingly, wickedly and corruptly, to defraud the said United States out of the possession and use

and the title to those certain portions of its public lands situate, lying and being within the said State and District of Oregon, and then and there being of great value, which are hereinafter described, and which were open to homestead entry under the land laws of the said United States at the time the respective homestead filings hereinafter mentioned were made thereon at the local land office of the said United States at Oregon City, in said State and District of Oregon, to wit: the northeast quarter of the southeast quarter of section thirty-three and the north half of the southwest quarter and the southeast quarter of the southwest quarter of section thirty-four, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Daniel Clark made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the northeast quarter of the southwest quarter and the north half of the southeast quarter of section thirty-two and the northwest quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which George F. Merrill made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southwest quarter of the southwest quarter, the northwest quarter of the southeast quarter and the south half of the southeast quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Granvel C. Lawrence made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southwest quarter of section twenty-eight, in township

eight south of range ten west (reference being had to the Willamette meridian and base line) upon which James Landfair made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the north half of the northwest quarter, the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Addison Longenecker made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southeast quarter of the southwest quarter, ter, the south half of the southeast quarter of section thirty-two, and the southwest quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Henry M. Riggs made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the south half of the northeast quarter and the northwest quarter of the southeast quarter of section twenty-two, and the southwest quarter of the northwest quarter of section twenty-three, in township nine south of range ten west (reference being had to the Willamette meridian and base line) upon which Louis Paquet made a homestead filing on the third day of October, in the year nineteen hundred; and the north half of the southeast quarter and the southwest quarter of the southeast quarter of section fourteen, and the northwest quarter of the northeast quarter of section twenty-three, in township nine south of range ten west (reference being had to the Willamette meridian and base line) upon which William T. Everson made a homestead

filing on the second day of March, nineteen hundred and one; by means of false, illegal and fraudulent proofs of homestead entry and of settlements and improvements upon said lands respectively by said entrymen respectively, and by causing and procuring said respective entrymen to make false and fraudulent proofs of settlement and improvements upon said lands respectively, and thereby to induce the said United States to convey by patent said public lands to the said respective entrymen without any valid or sufficient consideration therefor, said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe then and there well knowing that each of said respective entrymen were not entitled thereto under the laws of the said United States by reason of the fact that they and each of them had utterly failed and neglected to ever actually settle or reside upon said land for any period or periods of time whatsoever and to faithfully and honestly endeavor to comply with the requirements of the homestead law as to settlement and residence upon or cultivation of the land so filed upon by each of them, and defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe then and there well knowing that each of said respective entrymen was entering said land so filed upon by him for the purpose of speculation and not in good faith to obtain a home for himself:

And that in pursuance of said conspiracy and to effect the object thereof said defendants Willard N. Jones and Thaddeus S. Potter did cause, induce and procure said Daniel Clark, on the fifth day of September, nineteen hundred and two, to

make final proof before said Ira Wade, County Clerk of Lincoln County in said State of Oregon, a person entitled by law to take said proof, at the City of Toledo in said State and District of Oregon, and did then and there cause, induce and procure said Daniel Clark, in answer to the following questions, to make the following replies, to wit:

Ques. 3. Are you the identical person who made homestead entry No. 14233, at the Oregon City Land Office on the 18th day of June, 1902, and what is the true description of the land now claimed by you?

Ans. The NE ¼ SE ¼, Sec. 33, N ½ SW ¼ and SE ¼ SW ¼ Section 34, Twp. 8 S. R. 10 W.

Ques. 4. When was your house built on the land and when did you establish actual residence thereon? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. October, 1900. Established residence there at that time. House 14-16, orchard one acre and ½ acre in cultivation and fenced. Value, $450.00.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Myself and wife. Yes.

And to thereafter then and there sign and subscribe a statement entitled "Homestead Proof—Testimony of Claimant," known as form "4-369" of the General Land Office of the United States, containing said questions and answers, and to

swear to the truth thereof before said Ira Wade, a person then and there authorized under the laws of the United States to administer an oath in said case, and which said homestead proof so subscribed and sworn to by said Daniel Clark is in words and figures as follows, to wit:

(See transcript of record, page 20.)

The said defendants W. N. Jones, Thaddeus S. Potter and Ira Wade and each of them well knowing at the time said homestead proof was so subscribed and sworn to by said Daniel Clark that his answer to said question number five so then and there made by said Daniel Clark was false in this, that said Daniel Clark had never resided upon said land at all either with or without his family for any period or periods of time whatsoever.

And that in furtherance of said conspiracy and to effect the object thereof said Ira Wade did on the fifth day of September, nineteen hundred and two, subscribe and execute a certificate to the aforesaid homestead proof of said Daniel Clark, which is in words and figures as follows, to wit:

I HEREBY CERTIFY That the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 5th day of September, 1902, at my office at Toledo, in Lincoln County, Oregon.

IRA WADE,
County Clerk.

And that in pursuance of said conspiracy and to effect the object thereof said defendants Willard N. Jones and Thaddeus S. Potter did cause, induce and procure said Addison Longenecker, on the fifth

day of September, nineteen hundred and two, to make final proof before said Ira Wade, County Clerk of Lincoln County in said State of Oregon, a person entitled by law to take said proof, at the City of Toledo in said State and District of Oregon, and did then and there cause, induce and procure said Addison Longenecker, in answer to the following questions, to make the following replies, to wit:

Ques. 3. Are you the identical person who made homestead entry No. 14239, at the Oregon City Land Office on the 18th day of June, 1902, and what is the true description of the land now caimed by you?

Ans. Yes: N ½ NW ¼, and SE ¼ NW ¼, and NE ¼ SW ¼ Section 33, Twp. 8 S. R. 10 W.

Ques. 4. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. October, 1900. Established residence October, 1900. House 14-16. Orchard one and acres in cultivation and fenced. Value, $500.00.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Wife. Yes.

And to thereafter then and there sign and subscribe a statement entitled "Homestead Proof—Testimony of Claimant," known as form "4-369" of the General Land Office of the United States, containing said questions and answers, and to swear to

the truth thereof before said Ira Wade, a person then and there authorized under the laws of the United States to administer an oath in said case, and which said homestead proof so subscribed and sworn to by said Addison Longenecker is in words and figures as follows, to wit:

(See transcript of record, page 27.)

The said defendants W. N. Jones, Thaddeus S. Potter and Ira Wade and each of them well knowing at the time said homestead proof was so subscribed and sworn to by said Addison Longenecker that his answer to said question five so then and there made by said Addison Longenecker was false in this, that said Addison Longenecker had never resided upon said land at all either with or without his family for any period or periods of time whatsoever:

And that in furtherance of said conspiracy and to effect the object thereof said Ira Wade did on the fifth day of September, nineteen hundred and two, subscribe and execute a certificate to the aforesaid homestead proof of said Addison Longenecker, which is in words and figures as follows, to wit:

I HEREBY CERTIFY That the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 5th day of September, 1902, at my office in Toledo, in Lincoln County, Oregon.

IRA WADE,
County Clerk.

And that in furtherance of said conspiracy and to effect the object thereof said defendant Willard

N. Jones did, on the fifth day of May, nineteen hundred and four, cause and procure the following letters and affidavit to be sent to the Honorable E. A. Hitchcock, Secretary of the Interior, by C. W. Fulton, who was then and there a duly qualified and acting Senator of the United States for the State of Oregon, to wit:

(See transcript of record, page 31.)

Against the peace and dignity of the United States and contrary to the statute in such case made and provided.

FRANCIS J. HENEY,
United States Attorney.
H. RUSSELL ALBEE,
Foreman U. S. Grand Jury.

Names of Witnesses:

JOHN L. WELLS.
THOMAS JOHNSON.
ANTHONY GANNON.
LOUISE WENDORF.
GEORGE J. WEST.
ADDISON LONGENECKER.
G. RILEA.
JOHN MEISEK.
LEE WADE.

A true bill.

H. RUSSELL ALBEE,
Foreman Grand Jury.

Filed September 2, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon."

Motion to Quash Indictment.

A motion to quash the indictment was filed, supported by an affidavit (see page 50 of record), from which it appears that the names of the witnesses who testified before the Grand Jury were not endorsed upon the indictment. Whether or not this motion to quash should have been sustained, depends upon one question, namely: Is the practice in the Federal Court with relation to such matters governed by the laws of the State in which the Court is held? Section 1349, of Bellinger & Cotton's Code of Oregon, provides that the indictment must be set aside:

2. When the names of the witnesses examined before the Grand Jury are not inserted at the foot of the indictment or endorsed thereon.

This provision of the Code has been before the Supreme Court of Oregon several times.

State v. Pool, 20 Ore. 150.

State v. Smith, 29 Ore. 483.

State v. Andrews, 35 Ore. 388.

State v. Warren, 41 Ore. 348.

In all these cases the Supreme Court of Oregon held that the provision is mandatory and that the indictment must be set aside upon a failure to do so.

Does the local statute and practice govern?

In the case of the United States v. Mitchell, et al., 136 Fed. 896, a plea in abatement was filed by the defendant for various reasons. The Government claimed that since the local statute recognized

no such plea to an indictment, that therefore the Federal Court, sitting in Oregon, would not take cognizance of it. The matter was thoroughly argued, and Judge Bellinger, in ruling upon the matter, said:

"The rule by which the procedure in the Federal Courts relating to the organization of Grand Juries and objections to indictments is made to conform to the local law is too firmly established to admit of question at this late day. It has existed in this Court since its organization with the establishment of the State government, without objection until the present time." (Page 911.)

It would seem that the Government ought to be willing to be governed by this rule. It ought not to be allowed to blow hot and cold upon this question. Either the local statute and practice governs, or it does not. If it governs in one case, it does in another.

The Plea in Abatement.

The defendants filed a plea in abatement (see page 57 of the record) setting forth substantially the facts which were afterwards stipulated and are as follows (see page 63 of the record):

The Grand Jury which indicted the defendants was composed of twenty members. They were all present during the taking of the testimony against the defendants except one, F. W. Durbin. On Friday, September 1, 1905, all being present except Durbin, they all voted in favor of an indictment against the defendant Potter, and all but one as against the defendant Jones, but did not return

their indictment into Court at that time. They thereupon adjourned until Tuesday, the 5th day of September, 1905. After they had adjourned the United States Attorney and the Foreman caused a notice to be sent to them by mail, telegraph and telephone messages through the United States Marshal and his deputies, to meet again on Saturday, the 2nd day of September, 1905. Eighteen of them met on the 2nd, the said F. W. Durbin not being present and another one, Jackson A. Bilyeu, was not present because he was not notified. Durbin had been excused for an indefinite period by the Foreman and the United States Attorney on the 26th of August, and did not meet with the Grand Jury again until the 28th of September. On the 2nd of September, when eighteen of them met, they found this indictment and it was endorsed and returned into Court by the Foreman in the presence of the other seventeen.

Two or three questions might be raised upon this plea in abatement.

First. We know of no authority possessed by the Foreman of a Grand Jury or by the District Attorney to excuse a member of a Grand Jury. We think the Court could do it if sickness or some special reason was shown. Otherwise, we doubt its power to interfere with the organization of the Grand Jury. It is a very dangerous power, especially to be trusted to the hands of the Foreman or of the United States Attorney. If they have such power, they could indict whoever they desired to by getting rid of the non-pliable members, if there were such, by the process of excusing them. Mr. Durbin was not excused for the term and it

does not appear that there was any reason for his being excused, and if there was, it certainly ought to have been done by the Court, since no one else had the power to do so.

Second. The authorities are universal that the indictment must be returned into Court in the presence of the Grand Jury as a body.

Bishop's New Criminal Procedure, Vol. 1, Sec. 869.

State v. Bordeaux, 93 N. C. 560.

State v. Squire, 10 N. H. 558.

Third. But the ground which we wish to specially urge upon the Court is that the **Grand Jury was not in legal session** or organized on Saturday, the 2nd day of September, 1905. The only power which existed to determine the time and place of the sitting of the Grand Jury was the Grand Jury itself. It adjourned until Tuesday, September 5th. It was not reconvened by the Court and no one else had any authority to reconvene it. When certain members of the Grand Jury met again at a time previous to the date fixed for their meeting, they were simply individuals and nothing more. They had no more right to find an indictment under those circumstances than they would have had if they had accidentally met at a hotel or theater. Suppose the State Fair had been in session at the time of the adjournment and they had all, or a large number of them, say a quorum, gone to the State Fair, and while on the Fair grounds had found and returned this indictment. Would anyone contend that it was a valid indictment? A few years ago the Oregon Legislature adjourned on Friday night

until the following Monday. Ex-Senator H. W. Corbett gave them a dinner at the Portland Hotel on Saturday night and nearly all attended it, many more than sufficient to make a quorum. Suppose the presiding officers of the different houses had called them to order and they had proceeded to enact legislation while at the table at Mr. Corbett's dinner. Would anyone contend that the legislation was valid? Furthermore, neither Durbin or Bilyeu were notified or had an opportunity to be present. It may be said that if Bilyeu had been present he would have voted as he did the day before. Let it be conceded. That does not answer the question.

A special corporate meeting having to do with nothing more serious than questions of property, is utterly void unless every member has been notified. Mr. Thompson, in his work on Corporation, Sec. 706, says:

"The members of a corporation, public or private, can do no corporate act of a constituent character such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is duly assembled in conformity with the law of its organization. The same rule applies in respect of corporate business which is required to be done by the directors and which cannot be remitted to the mere ministerial agents of the corporation. So that the assent of a majority of the Directors at a meeting of the Board which has not been regularly called, as where notice of the meeting has not been given, will not be sufficient to give validity to an act as an act of the Board. It has been well said that an act of a majority of the

corporators does not bind the minority if it has not been expressed in the form pointed out by law, and accordingly that an act of a majority expressed elsewhere than at a meeting of the stockholders is not binding on the corporation, as where the assent of each one is given separately and at different times. The reason is that each member has the right of consultation with the others and that the minority have the right to be heard. In the line of authority establishing the foregoing principles, no break has been discovered, though it should be added that the election or other proceedings had at a meeting irregularly assembled may be valid if all attend and act or assent."

Sec. 707: "This leads to the conclusion that corporate meetings are invalid and that the business transacted thereat is voidable, unless the members have been duly notified of the meeting in accordance with the governing statute or by-laws, except in the case of stated meetings at which every member is bound to take notice."

Sec. 708: "Where a special meeting is called for the purpose of a corporate election, all the members entitled to vote at such meeting must be summoned or the election will be void. This point has been ruled again and again in the English King's Bench and it has been held that where a single member was not summoned by reason of his supposed absence and the consequent inability to summon him, the election was void."

Sec. 8486: "The general rule is that all the Directors of a corporation are entitled to notice of any meeting at which any corporate business is to

be transacted in order to make the action which takes place at any such meeting valid and binding."

Note 4: "It is almost needless to suggest that a minority of Directors cannot waive this right.

Citing Hill v. Rich Hill Coal Mining Co., 119 Mo. 9.

First National Bank v. Ashville Furniture, etc., 116 N. C. 827."

If it be true that the stockholders of a corporation or the Directors thereof can do no business at a special meeting without personal notice to every stockholder or Director, where it is only matters of property that are involved, can it be possible that a Grand Jury or a portion of it can fix a time to meet and give the minority to understand that they will meet at that time and then, without notice to a portion of its members, meet and find and return indictments involving the liberty and perhaps the life of a citizen? If this is the law, verily it "strains at a mouse and swallows a camel."

Demurrer to the Indictment.

It is, of course, elementary law that conspiracies are divided into two classes. First, conspiracies to accomplish a criminal or unlawful purpose. Second, a conspiracy to accomplish a purpose, not in itself criminal or unlawful, but by criminal or unlawful means.

The first class is easily defined, since it only includes those cases which some statute of the United States declares unlawful. Now, there is no statute making it an offense to defraud the United States out of its public lands. The conspiracy to do so is

a crime but the act of doing so is not a crime. That is to say, it is a crime to enter into a conspiracy to defraud the United States out of its lands, but the consummated act is not itself punishable as a substantive offense.

Nothing is a crime against the United States unless it is made such by statute.

Britton v. U. S., 108 U. S. 206.

U. S. v. Hudson, 11 U. S. (7 Cranch.) 32.

U. S. v. Coolidge, 14 U. S. (1 Wheat.) 415.

This offense then attempted to be charged in this indictment belongs to the second class of conspiracies.

The Means Must Be Set Out.

In the second class of conspiracies, the criminality consisting of the means employed; it follows as a natural sequence that the **indictment must set out the means,** so that the defendant will be apprised of the nature and cause of the accusation against him.

In Com. v. Hunt, 4 Metcalfe 111, Chief Justice Shaw said:

"And it follows, as another necessary legal consequence from the same principle, that the indictment must—by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable—set out an offense complete in itself, without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal

combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

"From this view of the law respecting conspiracy, we think it an offense which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the state of the case will admit, the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense. It is also necessary, in order that a person charged by the Grand Jury for one offense may not substantially be convicted on his trial of another. This fundamental rule is confirmed by the Declaration of Rights, which declares that no subject shall be declared to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him.

"From these views of the rules of criminal pleading, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense which is intended to be charged consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended

use of force, fraud, or falsehood, or other criminal or unlawful means, must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform. * * *

"Now, it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, etc.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offense. The same may be said of the concluding matter which follows the averment, as to the great damage and oppression not only of their said masters, employing them in their said art, mystery, and occupation, etc. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offense, they cannot be aided by these alleged consequences."

The same doctrine is held in Com. v. Shedd, 7 Cush. 514.

In U. S. v. Cruikshank, 92 U. S. 542, it is said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall.

174, that 'Every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' I. Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the Court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used

to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be **to cheat and defraud in a mode made criminal by statute**; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to **state the means proposed,** in order that the Court may see that they are in fact illegal. State v. Parker, 43 N. H. 83; State v. Keach, 40 Vt. 118; Alderman v. People, 4 Mich. 414; State v. Roberts, 34 Me. 321. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (State v. Roberts); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such an one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not **is a question of law, to be decided by the Court, not the prosecutor.** Therefore, the indictment should state the particulars, to inform the Court as well as the accused. It must be made

to appear—that is to say, appear from the indictment, without going further—that the acts charged, will, if proved, support a conviction for the offense alleged."

Mr. Justice Clifford, in his concurring opinion, uses the following language:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment; and, if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true intent and meaning of the statute defining the offense. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read, may be found in support of that proposition. 2 East. P. C., 1124; Dord v. People, 9 Barb. 675; Ike v. State, 23 Miss. 525; State v. Eldridge, 7 Eng. (Ark.) 608.

Every offense consists of certain acts done or omitted under certain circumstances; and, in the indictment for the offense, it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth. Arch. Cr. Pl., 15th ed., 43."

In Pettibone v. U. S. 148 U. S. 197, it is said:

"The general rule in reference to an indictment is that all the material facts and circumstances em-

braced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be **made directly and not inferentially or by way of recital.** United States v. Hess, 124 U. S. 486 (31: 516). And in Britton v. United States, 108 U. S. 199 (27: 698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy.

The Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in Com. v. Hunt, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose **not in iself criminal or unlawful,** by criminal or unlawful means, **the means must be set out.**"

We have quoted quite freely from the Massa-

chusetts case and from these cases, for the purpose of showing that the Supreme Court of the United States has accepted and adopted the doctrine of the Massachusetts Court. A few of the inferior Courts have undertaken to set up a different rule, but they find no authority for doing so in the decisions of the Supreme Court of the United States. For instance, the case of United States v. Dennee, 3 Woods 50, Fed. Case No. 14948. This case holds the opposite doctrine. The opinion admits that the Massachusetts cases, the New Hampshire case and the Maine case, cited by the Supreme Court of the United States in the Cruikshank case, have held otherwise, but relies upon a few English cases and the case of People v. Richards, 1 Mich. 216, ignoring the fact that the doctrine of the Richards case had been overruled by the Supreme Court of Michigan in the case of Alderman v. People, 4 Mich. 414, also cited by the Supreme Court in the Cruikshank case.

But whatever may have been decided by these inferior Courts prior to the decision of the Supreme Court of the United States in the Cruikshank case and the Pettibone case, the question is no longer an open one and must be admitted to be closed by the decisions of our Supreme Court.

By the adoption of the Massachusetts doctrine, the Supreme Court has also settled that the statute which makes consiracy to defraud a crime, cannot serve the double purpose of making it a crime to defraud. This was what was attempted to be done in the case of Com. v. Shedd, 7 Cush. 514.

It is not an unlawful purpose to obtain a homestead. It is the unlawful means that constitutes the fraud.

In this case the pleader has recognized the rule that the means must be set out and has undertaken to set them out. The rule is well settled that even though it was not necessary to describe the means particularly, yet when the pleader undertakes to do it, he is bound by his description. Stripped of its verbiage and of its epithets, what does this indictment charge? It is this: That these defendants, with John Doe and Richard Roe, entered into a conspiracy on the 2nd day of September, 1902, to defraud the Government out of the use and possession of certain of its public lands, in the following manner: "By means of false proof of homestead entry and of settlements and improvements upon said lands, and by causing and procuring certain entrymen to make false proof of settlements and improvements." Certainly that is not sufficient. The defendant is entitled to be informed as to the particulars in which said proofs were false, but this indictment does not allege wherein or in what particular said proofs were false. It does allege that the defendants then and there (when?) well knowing that each of said respective entrymen were not entitled thereto, by reason of the fact that each of them had utterly failed to ever actually settle, etc., and then and there well knowing that each of said respective entrymen was entering said land so filed upon by him for the purpose of speculation and not in good faith to obtain a home for himself. It hardly needs citation of authority to show that an allegation that the defendants knew a thing to be false is not equivalent to an allegation that it was false.

This question was before the District Court of

the Southern District of California in the case of United States v. Peuschel, 116 Fed. 642. The case is on all fours with the case at bar and is instructive upon two propositions arising in this case. The indictment charged that the defendants had entered into a consiracy to defraud the United States out of the title and possession of certain lands. It attempted to charge that the lands were mineral lands and not subject to entry and that in pursuance of said conspiracy a certain affidavit was filed by one of the defendants asserting the non-mineral character of said lands, and then proceeded, "The said Edward A. Peuschel and said Frederick G. Maid and said others to the Grand Jurors unknown, then and there well knowing that said lands referred to in said affidavit and for which application to enter was made by said Frederick G. Maid were then and there mineral lands and not subject to entry and settlement under the homestead laws of the United States, and that there were then and there within the limits of said lands valuable mineral deposits." Judge Wellborn, in passing upon this, said:

"This allegation asserts expressly a mental condition of the defendants, but only indirectly and by way of inference the mineral quality of the land, and for that reason is insufficient under the authorities below cited.

United States v. Smith, 45 Fed. 561.

United States v. Harris, 68 Fed. 347.

United States v. Long, 68 Fed. 348."

This same question was before this Court in the case of Bartlett v. United States, 106 Fed. 884.

This was an indictment charging the accused with having committed perjury by falsely omitting from his schedule in bankruptcy certain of his property. The opinion is by Judge Gilbert, and this question is discussed as follows:

"The indictment in the present case does not directly charge that the accused had at the time of making his affidavit, property other than that which was described in his schedule. It alleges that he knew that his affidavit was not true and that he knew that he was the owner of the sum of $5,000 in addition to what was mentioned in his schedule. This is not an allegation that the accused owned $5,000 above what was mentioned in his schedule. It is contended that it is equivalent to such an allegation because it may be reasoned that he had the money from the allegation that he knew he had it. Or in other words, that he could not have known he had it unless he had it. The facts material to be charged in the indictment must be **stated clearly and explicitly** and must not be left to **intendment** or reached by way of **inference or argument.** The indictment in this instance states no ultimate fact in regard to the ownership of the $5,000, or even as to its existence. It states only a condition of the mind of the accused, knowledge that he is said to have possessed. This is not sufficient."

Citing Harrison v. State (Tex. Cr. App.), 53 S. W. 863.

Com. v. Still, 83 Ky. 275.

Com. v. Porter (Ky.), 32 S. W. 138.

Com. v. Weingartner (Ky.), 27 S. W. 815.

It may be urged that the indictment charges

that said entrymen had not settled or resided upon said lands by taking the entire allegation, as follows: "Said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, then and there well knowing that each of said respective entrymen were not entitled thereto under the laws of the United States, by reason of the fact that they, and each of them, had utterly failed and neglected to ever actually settle or reside upon said land for any period or periods of time whatsoever and to faithfully and honestly endeavor to comply with the requirements of the homestead law as to settlement and residence upon or cultivation of the land so filed upon by each of them."

We submit that this is not an allegation that said entrymen had never settled or resided upon said land, but it is an explanation as to why the defendants knew that said entrymen were not entitled to the land. It says in substance that the defendants knew the entrymen were not entitled to the land because they had not settled on it. That is, of course, because the defendants knew they hadn't. The sentence is not open to any other construction, but if it were it would be insufficient because it would be undertaking to supply an essential element of the indictment by way of inference or recital. This cannot be done.

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication and the charge must be made directly and not inferentially or by way of recital."

U. S. v. Hess, 124 U. S. 483.

But this indictment is open to a still more serious objection in respect to this matter, for the reason that it is impossible to tell **when it was that these alleged facts did or did not exist** or this state of mind existed on the part of the defendants. The allegation is that the defendants entered into a conspiracy on the 3rd day of September, 1902, to defraud the United States out of certain lands, describing them. That Daniel Clark filed on a portion of them on June 18, 1902. That George F. Merrill filed on a portion of them on June 18, 1902. That Granville C. Lawrence filed on a portion of them on June 18, 1902. That James Landfair filed on a portion of them on June 18, 1902. That Addison Longenecker filed on a portion of them on June 18, 1902. That Henry M. Riggs filed on a portion of them on June 18, 1902. That Louis Paquet filed on a portion of them on October 3, 1900. That William T. Everson filed on a portion of them on March 2, 1901, and that the defendants **then and there** well knowing, etc.

Does this refer to the date of the formation of the conspiracy, or does it refer to the date when William T. Everson, the last one mentioned in the indictment, filed, or does it refer to some of the other dates mentioned in the indictment? It is impossible to determine and the **authorities are uniform that such an indictment is void.**

In Vol. 10, Enc. of Pleading and Practice, page 519, it is said:

"When time is once mentioned in any part of the information, it may be subsequently laid as the time of the commission of the offense by words of

reference as 'then and there,' with the same effect as if it were actually repeated; and likewise where the time is laid in one count it may be laid in subsequent counts by such words of reference, but such a reference is not sufficient where more than one time is laid in the part of the pleading referred to by the words, because it would not appear to which time such words applied."

Citing State v. Hays, 24 Mo. 360.

Jane v. State, 3 Mo. 61.

Com. v. Moore, 11 Cush. (Mass.) 602.

State v. Day, 74 Me. 220.

"Where the antecedent of 'then and there' is uncertain, as if more times or places than one are cited after which it is added that an act was 'then and there' done, the indictment will be insufficient."

Bishop's New Criminal Procedure, Vol 1, Sec. 414.

Citing U. S. v. Dow, Taney 34.

In United States v. Peuschel, 116 Fed. 648, Judge Wellborn said:

"Thus it will be seen that one element of the crime sought to be charged is that defendants knew said land to be valuable for its minerals and this knowledge must, of course, have been had at the time the conspiracy was formed. An allegation of such knowledge at any subsequent time, however brief the interval, for instance when the homestead application was filed or the affidavit sworn to, is insufficient. The clause in the indictment which most nearly fulfills the above mentioned requirement is the one last quoted, namely: 'The said

Edward A. Peuschel and said Frederick G. Maid * * * then and there well knowing * * * that there were then and there within the limits of said land valuable mineral deposits.' It is impossible to determine, however, from the words of reference used, whether the defendants had the knowledge imputed to them of the character of the lands at the time the conspiracy was formed or at the time said affidavit was sworn to or at the time said homestead application was filed, and **this is fatal to the indictment.''**

So in the case at bar, the defendants must have had the knowledge that the entrymen had not resided upon the land, etc., at the time of the formation of the conspiracy.

This is true, because it is not alleged in the indictment that there was any agreement between the defendants and the entrymen that the entrymen should not reside upon the lands. But suppose this was true, that they had not at that time resided upon the land a sufficient length of time or made the necessary improvements to entitle them to the homestead. They had an abundance of time in which to do this. The laws of the United States expressly give to the entrymen six months time after filing before they are required to make their entry upon the land. If they fail to make the entry within the six months, the Government does not cancel their filing for that reason, but it is subject to contest. Thousands of claims have been passed to patent where the entryman did not actually settle upon the land for a year after his filing, for the reason that the Government did not choose to interfere so long as there was no contest

on the part of a private individual. **So that the fact that they had not, at the time of the formation of the conspiracy, resided upon the land is utterly immaterial.**

We submit that this indictment is fatally defective:

1. Because it does not allege what proofs were agreed to be made.

2. It does not allege in what particular said proofs were to be false or were in fact false, or that they were in fact false.

3. If the Court could construe it to be sufficient in these respects, it is impossible to determine from the indictment when the facts which make the proofs false existed, or when the defendants had knowledge of the falsity.

Since the truth of the proof is not specifically negatived, as we have shown, the validity of the charge depends upon whether it is sufficient merely **to allege in general terms** that the proof was or was to be false. We contend that whenever the falsity of any instrument to be used as evidence, or of any evidence, is the basis of a criminal charge it is not sufficient to allege that it is false in general terms, **but the particular thing in which the falsity consists** and also the truth of the matter, must be alleged. There are two reasons for this rule; one is that the materiality of the matter may appear and the other is that the defendant may be informed of the nature of the accusation against him. If the proof was to be false in some immaterial matter there would be no criminal conspiracy. For instance, if the appli-

cant in answering the question as to the size of his family should say he had four children instead of three, it would not affect the validity of the proof; or to state a supposition more pertinent to this case, if he were to swear that he had resided on the land and improved it for **a less period than required by law to obtain a patent,** the matter would be immaterial because the Department could not issue a patent upon such proof. To do so would be in excess of the jurisdiction of the Department and beyond its powers. Congress has not conferred upon any Department the power to issue a patent to a homesteader upon proof of residence less than required by Act of Congress. The rule in perjury affords us a complete analogy. The proof of the homesteader is evidence to be used before the Department in order to secure a patent. If it is willfully false in a material matter the applicant is guilty of perjury. Every element, therefore, of the proof that would bring it within the law of conspiracy to defraud by means of false proof is the element that would bring it within the law of perjury.

In the case of the United States v. Shinn, 14 Fed. Rep. 447, the defendant was charged with perjury upon two assignments. It was a contest case under the Timber Culture Act, and the affidavit in the first assignment was that Reuben Kenny did not, within a year from the date of his entry break or plow five acres and did not do any plowing upon his claim during the first year. The truth of this was negatived by an allegation that Kenny did **some plowing.** The Court held this was immaterial because he was required under the Act to plow five

acres and the plowing of a less quantity was held to be immaterial. The second assignment was held bad, because the affidavit was to the effect that Kenny did not in the second year cultivate five acres by raising a crop; but this was negatived only by showing that he had plowed and harrowed ten acres. The Court held that this did not negative the truth of the affidavit because the law requires the cultivation of five acres to a crop.

In the case of the United States v. Howard, 37 Fed. Rep. 666, the Court made a similar ruling. This was a homestead claim and an application to commute the entry to a cash entry, and the affidavit which was made on July 3, 1887, was to the effect that the applicant had moved on the land in December, 1886; that his actual residence had been on the land up to taking the oath; **that his residence thereon had been continuous** and that he had not resided or boarded elsewhere than on said land since commencing his residence thereon. The Court held this allegation to be immaterial, because they were not statements required or authorized to be made in the affidavit of an applicant for confirmation of a homestead or "a homestead commutation entry," referring to Sections 2262, 2289 and 2291 of the Revised Statutes of the United States. Section 2291 requires proof of the residence for the term of five years, whereas the time between the moving on the land and the making of the affidavit was but a little more than six months.

That the truth of the matter in perjury must be specifically alleged is well settled.

2 Bishop's Criminal Procedure, Sec. 918.

2 Wharton's Criminal Law, Sec. 1300.

State v. Shupe, 85 Am. Dec. (and note) with authorities cited, page 498.

As we have shown there is no sufficient averment of **knowledge of the falsity** of this proof by the defendants. The case of Pettibone v. United States, 148 U. S. 197, is decisive that in such a case as this knowledge must be charged. In that case the purpose of the conspiracy was not to violate the injunction referred to, nor to obstruct the administration of justice, and therefore, the Court held that knowledge of the restraining order **could not be imputed to the defendants.** In this case, the purpose of the conspiracy is not to **promote or procure fraudulent entries** but only to **make false proof thereof.** Knowledge of the truth of the matter cannot be imputed to these defendants and must be specifically charged. If it be said that in this indictment the use of the word "knowingly" in the indictment is sufficient, there are two answers to that: The first is that the indictment does subsequently attempt to charge specifically the knowledge of the defendants; the same facts which we have shown to be insufficient. This specific charge must be supposed to be what was meant by the word "knowingly"; and under a familiar rule of construction, must qualify and limit the general term. That is to say, when it is said that the defendants conspired "knowingly" to defraud the United States by means of false proof and that the defendants knew at some indefinite time the entrymen were not entitled to patents and had not resided on the land, **it is that knowledge and not any other** that is included in the word "knowingly."

The other answer to the suggestion is made by this Court in the case of Salla v. United States, 104 Fed. Rep. 544. That was an indictment for conspiring "unlawfully, willfully, maliciously and **knowingly**" to destroy and obstruct the passage of a railway car and train which said "railway car and train was then and there carrying and transporting the mails of the United States." This Court, by Judge Gilbert, held the indictment fatally defective, because it did not charge expressly that the defendants knew that the said railway train was carrying the United States mail. The Court used this language: "The indictment charges conspiracy to commit an offense against the United States by conspiring together to unlawfully prevent, delay and obstruct a certain railway car and train which carries the mails of the United States. It does not charge that the conspiracy was for **the purpose to knowingly obstruct the mails**; if it had so charged the word **knowingly** might be said to have implied an imputation of knowledge that the United States mails were upon the train. The word "knowingly" as used in the indictment refers only to the action of the defendants in delaying the passage of a certain railway car and train. It is alleged that they willfully and knowingly obstructed the movement of the train. While it is true that the laws make the railways of the United States postal roads for carrying the mail, and a large number of passenger trains are engaged in carrying mail, it is nevertheless true that a great many passenger trains do not carry the mail. The defendants in this case are not charged with the overt act of obstrucing the passage of the mail or the carrier of the mail, but with conspiracy." And

so the Court held the indictment defective in this language: "The conspiracy as charged in the indictment lacks the essential ingredient of offense against the United States, to wit: that the defendants knew that the mails of the United States were carried upon the train which they conspired to obstruct."

Applying that case to the case at bar, we can say, that knowledge that the entrymen had not resided or did not intend to reside on the land **cannot be imputed to these defendants, because that was not within the purpose of the conspiracy.** At most the knowledge that is imputed to them by the word "knowingly" is a knowledge of the contents of the proof. Now the word "knowingly" may be sufficient to charge knowledge of the character of an instrument apparent upon its face; it may be held—it has been held—that the word "knowingly" sufficiently charges knowledge of the contents of an obscene letter deposited in the mails of the United States, but the obscenity is upon the face of the instrument. In the proofs, however, the falsity does not appear upon the face, but **arises from the nonexistence of facts aliunde—the proof.** The proofs themselves would seem valid and would be valid unless the entrymen had not completed their residence when the proof was made; knowledge of which by the defendants cannot be presumed since **they had nothing to do with the residence of the entrymen.**

There is another fault in this indictment upon which we greatly rely. **It does not charge any overt act done by any one of the conspirators.** For instance, Mr. Clark is charged to have made

false proof on the 5th day of September, 1902; but that proof cannot be the overt act, because Mr. Clark is not charged in the indictment to have been a member of the conspiracy. Since the statute requires that the act shall be done by one of the conspirators in furtherance of the conspiracy, it follows that the indictment must show that fact. The same observation can be made as to the other acts charged; none of them are charged to have been done by either of the present defendants. Ira M. Wade was charged to have taken the proofs, but he was acquitted by the jury, and therefore it is conclusively shown he was not a conspirator.

Now, what did Mr. Jones or Mr. Potter do in furtherance of this conspiracy to show that it was in active operation by them? The language of the indictment is that they "**caused, induced and procured** Daniel Clark" and the others to make false proofs, which are set out. But, to cause or induce or procure is **not the description of any act.** Admit the words mean that the defendants initiated a willful and wrongful effort to bring it to pass that Mr. Clark should make the false proof, we are still in the dark as to what that effort was; as to what act either of them did. Mr. Clark's proof, we may say, was the result of something that Mr. Jones or Mr. Potter did to influence him; we are entitled to know what that was. While the statute does not use the word "overt," the Courts without exception have defined the act as an overt act; that is to say it must be something palpable, tangible, capable of proof, and more than a mental act. It may consist of words spoken or written or other acts. We may imagine any number of things that

the defendants did whereby Mr. Clark was induced, caused and procured to make the proof: was it that he was asked to do it; that he was paid to do it; that the defendants agreed to buy the land from him when he should make the proof? The indictment answers none of these questions.

We are not aware that this precise question has been adjudicated in any conspiracy case, because the indictments usually allege an act done by one of the conspirators. We are assisted, however, in arriving at a conclusion here by an analogy which seems to be complete. In the charge of an attempt to commit a crime at common law and in most of the statutes an overt act is alleged and required to be proved, and the act must be specifically described and not in general terms.

Mr. Bishop says: "The conspiracy to commit a crime is in some degree in the nature of the solicitation, though it is more, and it is in part **within the rules which govern attempt.**"

1 Bishop on Criminal Law, 7 Ed., Sec. 767.

Also 2d Bishop Criminal Law, 2d Ed., Sec. 191,

where the learned author says, "We have already seen in a general way that **conspiracy is to a certain extent a species of attempt.**" Therefore, under Section 5440, we may say, that conspiracy and an overt act done in pursuance thereof, constitutes the attempt by more than one person acting in concert to commit a crime or a fraud upon the United States.

If it is necessary in the case of an attempt to

particularize the overt act in order to inform the defendant of what he is called upon to answer, for the same reason it is necessary to particularly characterize the overt act in the conspiracy in order that the defendant may be able to show, if he can, that the act was not done. In this indictment the defendants are informed that Mr. Clark and Mr. Longenecker made their proofs on the 5th day of September, 1902; but they are not informed **what they themselves are charged with doing in connection therewith.**

That in attempts the act must be described is stated to be the rule by Mr. Bishop. "The description of the act of attempt," he says, "it is but a repetition to state, must be specific and individualizing. The single word **attempt**—did attempt feloniously to steal—does not, as an allegation should, show to what class of attempts to steal the goods, or individual instance, belong, the nature or extent of what was done, or anything else specific to the particular accusation."

2 Bishop's New Criminal Procedure, Sec. 88.

See also Section 91, where the author criticises a contrary rule announced in Alabama.

"Indictments for attempts to commit a crime must aver the intent and the overt act constituting the attempt."

3 Ency. Pleading & Practice, 98, Note 3, Marginal Note 7,

where a number of causes are given illustrating the rule.

So, we say in conclusion on this point, that the

words "caused, induced and procured" constitute the only charge of anything done by the defendants in pursuance of the conspiracy, and that these words are not sufficiently definite to describe the act relied upon as the overt act.

Nor is the difficulty obviated by applying the principle that what one does by another he does by himself. That is true as a matter of evidence, but it is not true as a matter of pleading. When an **act is made criminal,** the charge must be direct and not inferential. It would not be good to charge a man with committing murder by charging him with causing another to commit murder, although if that were the fact he might be guilty as principal. Under the present statute, as we have seen, the act relied on as the overt act must be done by a conspirator, and the indictment does not charge that by charging not directly but indirectly **that he caused it to be done.**

We submit, therefore, that this indictment is bad for the reasons:

First. That there is no sufficient allegation of knowledge on the part of the defendants of the falsity of the proof.

Second. There is no sufficient allegation of an overt act on the part of either one of the conspirators.

Third. There is no sufficient allegation of any material matter in which the proofs were or were to be false.

The Statute of Limitations.

In this case the evidence showed clearly that the agreement or conspiracy, if there was one, **was formed in the year 1900.** The testimony was that Jones and Potter made arrangements with Wells to procure people to file upon this land and that Wells arranged for and procured the persons mentioned in the indictment, and others, who were willing to file upon this land upon the conditions named by the defendant Jones. The first step after that was to have the parties execute an agreement with Mr. Jones, which has been set out in the record, page 900, Government's Exhibit No. 26, and the testimony shows that every one of the entrymen mentioned in the indictment executed such an agreement before he went upon the land. That they then visited the land at different times and afterward filed upon it and finally made final proof.

Now, if there was a conspiracy on the part of the defendants to acquire these lands unlawfully, it must have been consummated before the signing of these contracts, and the signing of the contracts was an act in furtherance of the conspiracy. The visits to the land, the filing in the Land Office and all the steps taken by the parties for the purpose of making proof were overt acts and it is undisputed, in fact, it is affirmatively shown by the testimony of the prosecution, **that not one but many of these overt acts were committed prior to September 2, 1902. The indictment was found on September 2, 1905.**

The question of the statute of limitations was raised by objections to the testimony and by re-

quest for instructions, so that the question is squarely before this Court as to whether or not the statute of limitations against a conspiracy **begins to run from the commission of the first overt act** or rather whether an **overt act will toll the statute of limitations.** This question has been much discussed and variously decided.

At common law, no overt act was required to make a conspiracy indictable, and therefore the question does not seem to have arisen. We must look, therefore, to the statute under which this prosecution is conducted and to the decisions of the American Courts for light upon the subject.

As a matter of reason and logic, it seems to us that there is but one side to the question. The Supreme Court of the United States has settled the question so that it is no longer open to dispute that **the conspiracy is the crime** and that an **overt act is no part of the crime.** The statute of the United States, however, under which this prosecution is brought does not allow an indictment to be found until an overt act his been committed. As soon as this act has been committed in pursuance of the conspiracy, then of course the conspirator is liable to indictment and the statute begins to run. Does the commission of another overt act toll the statute or prevent it from running? It seems an absurdity to say that an act which is no part of the crime and which may in itself be perfectly innocent can prevent the running of the statute.

If the statute said "every person who shall enter into, pursue, be concerned in or knowingly take part in carrying out any conspiracy," etc.,

then there could be no question about it, but it does not so state. It makes the combination, the agreement, a crime. Suppose it said "Whoever shall enter into a written agreement," and certain persons should execute a written agreement in violation of the law and commit an overt act and then cease to do anything in pursuance of the agreement for a period of three years, would it be contended that they could be prosecuted if any one of the conspirators subsequently committed an overt act? Would the doing of an overt act constitute the crime of entering into a written contract? Nobody would so contend. Does it make any difference that the contract is oral? Certainly not. What would the doing of an overt act prove or indicate? That the parties had entered into another written agreement? Not at all. It would be evidence that they were attempting to carry out their original agreement and not **that they had made another.**

The first American case to discuss this question to which our attention has been called, is People v. Mather, 4 Wendell 229. In this case the defendant was acquitted and the People asked a new trial, for the reason that the Court had misconstrued the law. The Court had told the jury that a party who entered into and assisted in carrying out the object of the conspiracy after it had been formed and was under way, was not a conspirator. The Court held this to be wrong, and properly so, because whenever he entered into it he became a party to the agreement or conspiracy.

In discussing this question, the Court said that whenever they act, there they renewed, or perhaps to speak more correctly, they continued their agree-

ment and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. The Court will notice that this was not necessary to the decision of the question and was certainly put upon the wrong ground. The true theory is that when the defendant joined hands with the conspirators and aided them in carrying out their plans, he thereby adopted their agreement and became a party to it. This case was decided in 1830.

In 1877 the question came before the Supreme Court of Pennsylvania, Com. v. Bartilson, 85 Pa. St. 482. The first count of the indictment showed that the conspiracy had been formed more than two years before the finding of the bill, two years being the statute of limitations. Mr. Justice Paxson delivered the opinion. He said:

"It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had in pursuance and renewal of said conspiracy, committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time to time and the statute was thereby tolled. This is plausible, but unsound. The offence charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge and if that be proved the defendants may be convicted. (Citing various authorities.) According to the first count, the offence was complete on the 20th day of December, 1874. The overt acts set forth do not constitute the offence. They are the evidence of it and are somtimes said to be the aggravation of

it. An overt act may and may not be unlawful per se. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was renewed from time to time does not meet the difficulty. If it proves anything, it proves too much. The renewal of a conspiracy means to begin it again, to recommence it, to repeat it. From this it is apparent that each renewal is a new offence, a repetition, it is true, of a former one, but still an offence for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20, 1874, as charged in the count, they aver distinct offences. It is a well settled rule of criminal pleading that distinct offences cannot be joined in the same count. * * * The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in renewal of the original conspiracy. It was practically laying an offence with a continuando. It was an attempt to prove the existence of the crime **within the statutory period** by showing its commission **outside of such period** and that it had been continued down to a time within it. In a recent case in which I delivered the judgment of the Court (Gise v. Com., 31 P. F. Smith 428), the doctrine was asserted that there is no such thing as a continuing offence, that it is wholly unknown to the criminal law."

The second count of the indictment charged an offence within the statutory period. A bill of

particulars was furnished the defendants showing the particular acts relied upon to establish the conspiracy. Most of those were outside of the statute. For this reason the lower Court quashed the second count, but Judge Paxson held this to be erroneous, not because the overt acts would toll the statute, but because they might be evidence from which a jury could infer the existence of a new conspiracy. He said:

"Acts and declarations of the parties prior to the statutory period may be given in evidence, provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the statute, but where in conspiracy an overt act is done within two years and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series and a result of an unlawful combination, and such evidence may satisfy a jury of the existence of a conspiracy at the later period."

This decision is cited on both sides of this question, but we think a careful reading of it sustains our contention.

Judge DeHaven, in the recent case of United States v. Brace, 149 Fed. 874, cites this case as favoring the contention of the defendants.

The question again arose in the case of United States v. Owen, 32 Fed. 534. The opinion of Judge Deady is very clear and distinct, and says:

"However, this is an instantaneous crime, composed of the conspiracy and the first act done to effect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal and the limitations on the right of the Government to prosecute him begins to run and in three years the bar is complete."

In 1888 this question arose in Illinois in the case of Ochs v. People, 124 Ill. 399 (16 N. E. 662). This was a case where the defendants were accused of conspiring to defraud the County. The evidence showed a very wide-spread conspiracy to rob the County by making up false and fraudulent bills, by corrupting the Commissioners, etc. It was a case which aroused public opinion greatly and was calculated to provoke a great deal of feeling. The defendants asked for an instruction that the conspiracy was completed when it was entered into and that the statute of limitations began to run at that time. The Supreme Court in passing upon this question, says:

"The first instruction as to all the defendants was faulty and misleading in telling the jury that the agreement or conspiracy was complete and the offence was then committed when the agreement or confederacy was entered into and that the period of limitation would commence to run from the time of committing the offence. The instruction was calculated to lead the jury erroneously to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy, instead of from the time

of the commission of the last overt act in furtherance of the object of the conspiracy."

That is all. No attempt is made to show, either by reason or authority, that the Court was correct. It did not attempt to sustain itself in any way.

This question was raised again in the Federal Court in 1895 in the case of United States v. McCord, 72 Fed. 159. Judge Bunn said:

"I have no doubt that the statute of limitations has stood in the way of this prosecution from the first and that counsel for the Government have felt the difficulty. They admit that the indictment may properly have been found in March, 1891, that the conspiracy to defraud the Government was then formed by the defendants and various overt acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies from what you have in other offences against the Government, which could not have been the intention of the law. The purpose evidently was to make a uniform rule applicable to all offences of the same grade. Counsel no doubt anticipated this difficulty and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now, to make good this contention, it is claimed that the conspiracy is a continuing offence. No doubt a conspiracy is a continuing offence in this sense, that whenever an individual goes into a conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators and is liable in the same de-

gree with them. But that it is a continuing offence in the sense that as to the first and original conspirators this statute begins to run anew from the time of the commission of every overt act, is a contention that the Court is unable to affirm."

In 1897 the question arose in Mississippi, in the case of Insurance Company v. State, 75 Miss. 24. The question arose on a demurrer to the indictment and it is a little difficult to determine exactly which side of the question the opinion is on. It is cited by both sides. For example, in Ware v. United States, 154 Fed. 579, Judge Sanborn cites it as favoring the theory of the prosecution. In United States v. Brace, 149 Fed. 877, Judge DeHaven cites it as favoring the contention of the defendants. We think a careful reading of the opinion will show that what the Court means to say is the same as was intended by the case of Com. v. Bartilson, that if it is intended to prosecute the original conspiracy upon the theory that overt acts have been performed within the statute, that it cannot be done, but that the overt acts may be evidence from which a jury may find a new conspiracy. The Court says:

"If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed more than two years before the finding of the indictment, the prosecution would of course be barred. Or if, treating this offence as composed of the original conspiracy plus the first overt act done in pursuance of it and as completed when such first overt act is done, then if such overt act was done more than two years before the finding of this indictment, in that case

also the prosecution would be barred. But the conspiracy presented by this indictment is a conspiracy formed in Lauderdale County within two years before the finding of this indictment, as manifested by overt acts committed within that time, such overt acts operating in law as a renewal when committed, of the original conspiracy. The question is thus resolved into ascertaining whether the pleader has averred such conspiracy thus renewed as a separate, new offence within the two years, and this the indictment does."

The Court distinguished their statute from Sec. 5440 of the United States, and says:

"Besides the difference between that statute and our statutes, the United States Supreme Court has expressly held that the offence denounced by Sec. 5440, United States Statutes, does not consist of both conspiracy and the acts done to effect the objects of the conspiracy, but of the conspiracy alone.

United States v. Britton, 108 U. S. 204.

Dealy v. United States, 152 U. S. 546.

These cases afford no help."

The opinion clearly indicates that in Mississippi the offence consists of the conspiracy and the overt act, whereas under Sec. 5440 the crime is the conspiracy alone, and that if the Mississippi Court was construing Sec. 5440 it would hold that the overt act not being part of the crime, would not operate to toll the statute of limitations.

The case of United States v. Greene, decided February 24, 1902, has been cited as sustaining the

contention that an overt act renews the conspiracy, but the case does not, in our judgment, so decide. The Court, in discussing the sixth count of the indictment, says:

"The count further charges that Carter, as such engineer officer in charge, would exercise the powers of his office fraudulently and corruptly in favor of the contractors in such contracts as might be so obtained by the alleged conspirators, etc. This is an additional and independent charge of conspiracy. **It does not depend upon the original scheme** set out in the first count of the indictment. It is in my judgment a valid count under Sec. 5440, Revised Statutes. It charges a conspiracy to defraud the United States in the several particulars mentioned in the other conspiracy count by the fraudulent exercise of those powers."

This question arose upon a demurrer to the indictment and the Court held that the pleading which charged a conspiracy and then in another count charged a later conspiracy for the purpose of applying and using the former one, was good as a matter of pleading and this is the extent of the decision.

This question next arose in ex parte Black, 147 Fed. 832, and the opinion is by Judge Quarles. He says:

"The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the statute running, because it was an open act on the part

of the defendants to effect the purposes of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3rd day of April, 1906. To escape this dilemma, the pleader has been driven to skillful fencing and adroit expedients. It is contended on the part of the Government that this was a so-called continuing crime. Conceding for the purposes of the argument that a conspiracy may under certain circumstances be recognized as a continuing crime, what fact or feature is there here to bring this case within such a classification? Here the conspiracy was confined to a single undertaking limited to particular descriptions of land and completed within six months. The entrymen were handled like a drilled squad and transported from place to place, taking the several necessary steps which culminated on the 17th of March, 1903. No effort was made to enlarge the original conspiracy, to embrace any other lands or adapt it to any further or different transaction. In the Greene-Gaynor case, United States v. Greene, 115 Fed. 349; Greene v. Henkle, 183 U. S. 251, the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts whereby the Government was defrauded and in 1897 it was revived as to certain new Government contracts. There might be some reason for treating that as a continuing offence which was revived fresh with each new contract, but there is no well reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first. In cases of that nature, the

doctrine of Com. v. Bartilson, 85 Pa. 482, and Insurance Co. v. State, 75 Miss. 24, is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy and a jury may be warranted from all the evidence in finding the existence of such new offence within that period. This appears to have been the course adopted in U. S. v. Greene, 115 Fed. 349. The indictment charged a conspiracy in 1891 and another in 1897, notwithstanding what is said in the opening about a continuing crime. Certain it is that on the 8th day of October, 1902, a definite overt act was performed, and on the 9th day of October, 1902, an indictment charging the conspiracy might have been found. Certainly the statute began to run at that date."

The next case in which the question arose is United States v. Bradford, 148 Fed. 413. The opinion is by Judge Parlange. The learned Judge criticizes the decision of the Supreme Court of the United States in United States v. Britton, 108 U. S. ——, which holds that the overt act is no part of the crime. He says:

"A criminal offence against the sovereign, which he cannot prosecute and punish, is, it seems to me, a matter which the legal mind cannot grasp. It is plain, then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed, and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offence can be prosecuted, and the statute of limitations begins to run as regards that con-

spiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. * * * That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter continued or repeatedly renewed, and many other overt acts committed under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated. * * * While the conspiracy per se might be the same, yet if the conspirators chose to renew it, or to continue it in existence, and to commit new overt acts to carry it out, the conditions under which the right of the Government to prosecute would arise, would be different every time a new overt act was committed."

Judge Parlange had the courage to follow his logic to its ultimate result, namely: That parties might enter into one single conspiracy, which is the crime as defined by the Supreme Court of the United States, and might be punished for a hundred crimes, although only guilty of one. He undertakes to defend this by reference to the case of O'Neal v. Vermont, 144 U. S. 331, in which the defendant was convicted of three hundred and seven different offences for selling liquor and sentenced to pay more than $6,000 in fines and 55

years in the penitentiary. But there is no similarity in the cases whatever. The difference is apparent to the merest tyro in the law. The statute under which O'Neal was prosecuted explicitly made each sale of liquor a separate offence, while the statute of the United States under consideration makes the conspiracy alone the offence. If it said each overt act should constitute a separate offence, then the comparison would be proper. That so learned a Judge should have been driven to defend his opinion and its results by such a comparison is conclusive evidence of its weakness.

If the theory of Judge Parlange is correct, that each separate overt act is a separate offence and may be indicted and punished, how is the defendant going to know when he is convicted after proof of a dozen overt acts, which one of the crimes he has been convicted of, and how is he going to plead his conviction or acquittal in bar of another prosecution? If they are all separate offences he is subjected to be convicted and punished for each one, and a prosecution for one would not bar a prosecution for another. But it would be impossible to tell of which offense the defendant has been convicted or acquitted and his constitutional right to be tried but once for any crime would become a thing of no value whatever.

The question next arose in the case of United States v. Brace, 149 Fed. 874. The opinion is by Judge DeHaven. The learned Judge admits that the Owen case, the McCord case, the Black case, the Bartilson case and the case of Insurance Co. v. State, sustain the view that the statute runs from the first overt act, and proceeds:

"The argument which is advanced to sustain this conclusion is very strongly stated by Deady, Justice, in United States v. Owen, 32 Fed. 534, and proceeds upon the theory that the conspiracy is not to be deemed a continuous crime while in process of execution, but is a completed offence the moment the first overt act is committed in pursuance thereof, as much so and in the same sense as the crime of murder or arson is completed and at an end when the deed is done. Of course, if this be so, the statute of limitations would commence to run at the date of the commission of said overt act. But it seems to me that the more reasonable view is that which was followed by the Supreme Court of Illinois in the case of Ochs v. People, 16 N. E. 662, and United States v. Greene, 146 Fed. 803, and that is to regard the conspiracy as a continuing offence so long as the parties thereto continue to perform acts to effect its object, and thus considered, the prosecution thereof is not barred if any overt act has been committed within the statutory period."

The Court will notice that the learned Judge does not undertake to reason the matter out, but simply says that it is his opinion this rule is more reasonable. He was not willing to follow his conclusion to its logical result as was Judge Parlange, because he adds:

"In saying this I do not mean to be understood as holding that when a number of acts have been committed in furtherance of one conspiracy there may be as many prosecutions therefor as there were acts. There can be but one prosecution based upon

a single conspiracy and this is not barred as to any overt act within the statutory period."

The next and last case in which this question arose is the recent case of Ware v. United States, decided July 10, 1907. The opinion in that case is by Judge Sanborn, with whom concurred Judge Hook. Judge Phillips dissented. Judge Sanborn says, after citing the authorities pro and con upon this question:

"After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of a conspiracy and a conscious participation of the defendant therein within three years, are indispensible to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or

agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

Judge Phillips dissented. After showing that it was well settled that the conspiracy is the crime and not the overt act, he says:

"The conspiracy shown by the Government to have been entered into between Ware and Lambert in October, 1902, made effective by an overt act, could no more form the basis of this prosecution than if Ware had been indicted therefor within three years thereafter and convicted or acquitted thereof. The statute of limitations was as effectual a bar as a plea of autrefois convict or autrefois acquit.

"No matter how many overt acts may have been committed by Lambert pursuant to that conspiracy, there was but one act for which the parties could be punished, and that was the consummated unlawful conspiracy. The action of the trial Court recognized this as the law, for while the plaintiff in error was found guilty on several counts, there was but one sentence imposed, as the conspiracy, and not the overt act, was the offence made punishable by the statute. Indeed, there was no occasion for more than one count in this indictment. After alleging the existence of the conspiracy, it was perfectly competent to proceed to set out in the same count all of the overt acts claimed to have been committed in furtherance thereof.

"The irrefutable logic of the law, it must therefore be conceded, is that, no matter how many overt

acts may be committed, if they are referable to one and the same conspiracy, they constitute not several conspiracies or evidence of as many conspiracies. The conspiracy on which the minds of the parties met was one and indivisible, and whenever it is consummated by the commission of one overt act, a statutory limitation, eo instanti, attached and creates a bar to the prosecution. The corollary of this postulate indisputably must be that, after the original conspiracy has been followed by any overt act, more than three years prior to the indictment, to support the prosecution under the statute there must be a wrongful agreement found and an overt act done in furtherance thereof within the three years.

"Names are of little consequence here. Whether we call it a new or renewed conspiracy, the essential requirement of the law, to give the statute of limitations the protective efficacy of its spirit, is that there must be a conspiracy between the parties charged formed within the statutory period of limitation.

"To constitute any agreement as the basis of a civil action or criminal prosecution, there must be the aggregatio mentium—the coming together of the minds of the parties in the formulation of its terms. It must be established by competent, substantial evidence, and not by conjecture, and in a criminal case like this it must be established to the satisfaction of the jury beyond a reasonable doubt.

"This brings us face to face with the crucial question in this case: The indictment charges a conspiracy formed within three years after the

alleged conspiracy of October, 1902, was barred by the statute of limitations, and it sets out the overt acts done in pursuance of the conspiracy. There is no allusion in the indictment whatever to the antecedent conspiracy agreement of October, 1902, and the first overt act done thereunder; nor is there any allegation that that agreement was continued to within the three-year period, by any wrongful agreement or any co-operation or participation of the parties in the overt acts. And yet, to support the indictment, the Government made proof of the antecedent agreement of 1902 to make out a case. And what is most remarkable in the trial of the case the Government made proof of the McKibben entries in furtherance of the original conspiracy, which confessedly occurred more than three years prior to the indictment. In respect of this the Court told the jury that this evidence 'was received solely for the purpose of throwing light upon the transactions mentioned in the indictment, so far as it might, in determining: First, whether or not there was a conspiracy such as charged, upon the part of any of the parties connected with said entry; and second, to determine the motive and intent of the parties in entering into such conspiracy or agreement.'

"No refinement or specious reasoning can obscure the fact that the jury were thus authorized to determine whether or not there existed the conspiracy charged in the indictment by having recourse to the McKibben entries. In other words, the jury were warranted in inferring the existence of the essential fact of a renewal of the antecedent conspiracy, barred by the statute of limitations, from the character and quality of an overt act done more

than three years prior to the conspiracy laid in the indictment; and the jury were further authorized, from such antecedent barred overt act, to determine the motive and intent of the parties in entering into such conspiracy or agreement. What conspiracy or agreement was meant?

"* * * If there was no new or different agreement from that under which the McKibben entries were made and that agreement was barred when the overt act evidenced by said entries was committed, then subsequent overt acts within the three-year period were clearly referable to, and were in pursuance of, the original agreement. So if the McKibben entries had occurred inside of the three-year period, then every subsequent overt act could have been laid in one and the same count as in furtherance of the agreement entered into in October, 1902.

"Thus we are confronted with the proposition of a continuing offence without any direct proof of the meeting of the minds of the parties in a new or renewal agreement, in order to toll the statute of limitations."

The difference between these two opinions runs through all of the cases on this subject. Every judge who holds that an overt act tolls the statute of limitations does so without any attempt to demonstrate it by reason or logic. Every judge who holds that it does not do so is able and willing to give the reasons "for the faith that is in him."

The case at bar was very similar to the Ware case. The indictment in this case charged that the conspiracy was entered into on September 2, 1902,

exactly three years prior to the finding of the indictment. There was no allegation in the indictment that there had been a former conspiracy which had been renewed and there was no attempt upon the trial to steer into the middle ground suggested by Judge Sanborn of permitting the jury to infer a new conspiracy.

The Government offered no proof of any conspiracy except one made in 1900 and then showed overt acts performed under it long before the three-year period prior to the filing of the indictment. It was not claimed or suggested that there had been any renewal, but the counsel for the Government boldly took the position that he proposed to show a conspiracy in the year 1900 and that it had continued to the time mentioned in the indictment.

On page 846 of the record, the witness Wells was asked the question by the Government: "And did you in 1900 have any talk with Potter and Jones in relation to securing soldiers' widows to file upon lands?" And the witness answered, "Yes." He was then asked to state what the conversation was and where it took place. Defendants objected upon the ground of the statute of limitations, and the Court said: "Is it to show any proof?" And Mr. Heney answered that he would connect the evidence and **propcsed to show that the agreement called for by the question was then and afterwards continued in existence down to the time of the finding of the indictment.**

And again, on page 848, upon objection to testimony with relation to this agreement as being a different conspiracy, Mr. Heney said to the Court

that the evidence was offered for the purpose of showing system and knowledge and proposed to connect the evidence and that it proposed to show that after filing for a few of the widows that they (meaning the defendants) took up the filing of the soldiers in the same connection, on the same general plan, and in the same place. So that this case cannot be determined or affirmed upon the doctrine of Judge Sanborn in the Ware case.

It presents the bald, naked question whether or not a conspiracy formed in 1900 and overt acts done thereunder at that time can be prosecuted by an indictment found September 2, 1905, because it is claimed **overt acts were done within the three-year period.** If the overt acts were the crime or a constituent element of the crime, then of course that would be so, but since it is settled by the Supreme Court of the United States that the conspiracy alone is the crime, there is no species of logic by which it can be reasoned out that an overt act tolls the statute of limitations. No Court or Judge has ever attempted to demonstrate it by logic and we think none ever will. It is impossible.

The only argument that any Court has ever attempted to use in sustaining that position is the argument ab inconvenienti. It is said if a conspiracy may be formed and overt acts done thereunder and the Government does not find it out, the parties may wait three years and then go on with their conspiracy and escape punishment. That is true, if the overt acts committed are not independent offences of themselves. If they are, they can be punished. But all statutes of limitation allow some criminals to escape. It is thought to

be better upon the whole that some should escape than that men should be prosecuted for offences committed long before, when the witnesses are perhaps scattered or dead.

But taking the argument of convenience, let us look at the other side of it. If the doctrine contended for by the prosecution is true, then A, B and C, when they are twenty years of age, may enter into a conspiracy and commit an overt act. The matter is then dropped and nothing is done for sixty years. One of them then commits an overt act in furtherance of the conspiracy. The other two defendants, who have lived perhaps blameless lives for sixty years, may be indicted and punished for their offence. Or it may be that they are innocent, but owing to the lapse of time and the death of witnesses they are unable to demonstrate their innocence and are convicted.

The argument of convenience has no place in a court of law, but if it is to be relied upon, we submit that from that standpoint the contention of the defendant is better.

The Means Must Be Such as Could Possibly Defraud.

This objection applies more particularly to the evidence introduced upon the trial than to the indictment, although we contend that the better rule is that the indictment should show that the means were adequate to defraud the Government.

In United States v. Reichart, 32 Fed. 142, the opinion was rendered by Mr. Justice Field of the Supreme Court of the United States. The charge

was a conspiracy to defraud the United States under Sections 5438 and 5440 of the Revised Statutes. The allegations were that they conspired to defraud the United States by making a false, fictitious and fraudulent claim upon the United States, knowing the same to be false, fictitious and fraudulent, which was to consist of a certain false, fictitious and fraudulent survey of certain public lands and making false field notes of the same, and which false, fictitious and fraudulent claim and the field notes thereof was designed and intended to be presented to the United States Surveyor General for California for his allowance and approval. Judge Field and the Circuit Judge sitting with him agreed that **the absence of any averment of authority in the Surveyor General to allow and approve the claim which was to be presented to him was of itself a fatal defect.** On re-hearing the Court adhered to its first opinion, and added that the indictment was also defective in not stating that the accused knew that the claim was false, fictitious and fraudulent. The only possible necessity for the allegation that the Surveyor General had authority to allow the claim would be to show that it was possible for the United States to be defrauded by the proposed scheme. In other words, if it was impossible to defraud the United States by the scheme or plan devised or means proposed to be used, then no crime is committed, no difference how reprehensible the conduct of the defendants might be.

The same question was before His Honor, Judge Dillon, in the case of United States v. Crafton, Fed. Case No. 14881 (4 Dillon 145). The charge was:

1. That the defendant Crafton was Adjutant General and Acting Paymaster of the State of Missouri. That his son was a clerk in his office; that other defendants were agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled Missouri militia, growing out of their alleged service in the war for the suppression of the Rebellion. 2. That for the purpose of defrauding the United States out of the money alleged to be due for such services, the defendants conspired together to obtain the payment thereof out of the Treasury of the United States. 3. That to effect the object of such conspiracy, certain of the defendants made a false and fictitious muster and pay roll of said company and presented the same to the defendant John D. Crafton to audit, approve and allow the claim. 4. That to further effect the object of such conspiracy, said defendant, as Acting Paymaster, did audit, approve and allow the claim and issued certificates of indebtedness of the State of Missouri for the amount claimed to be due on said roll. 5. That further to effect the object of the conspiracy, the defendants transmitted this false and fictitious muster and pay roll to the Third Auditor of the Treasury of the United States. 6. That further to effect the object of the conspiracy, the defendants employed Craig and Strong to secure the passage of a bill which had been introduced into the Senate of the United States for the payment of said fraudulent claims. The opinion says:

"If, at the time the acts set forth in the indictment were done, the general Government had pro-

vided for the payment of such claims out of its own Treasury, undoubtedly those acts fraudulent in their nature and object would have been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable. **Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud, but the nature of the fraud and to the required extent the manner in which or the means by which it was to be effected must be offered.** United States v. Cruikshank, 92 U. S. 542-558. In the case at bar this has been attempted by the pleader but the difficulty is that it appears from the averments **the alleged conspiracy to defraud the United States was, under the existing legislation of Congress, legally impossible of execution.** * * * However fraudulent in ulterior design or morally reprehensible the acts charged in the indictment may be, still our judgment is that Sec. 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an Act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained."

Other cases might be cited, but we think none are needed. The proposition seems to us to be self evident. Suppose that the indictment or the proof showed that the defendants conspired to defraud the Government out of its lands by offering proof that they had never lived upon these lands at all; had never filed upon them, never settled upon them and had never made any improvements upon

them. Could it be contended that the defendants might be convicted? Certainly not, and the reason would be, of course, that it would be legally impossible for the United States to be defrauded by any such proof.

Suppose that the indictment charged that they conspired to defraud the United States out of its lands by causing a story to be published and circulated throughout the country, and persuading people to believe it, to the effect that the moon was made out of green cheese. Would such an indictment be good? The question needs no answer, and the reason is, of course, that it is not legally possible for the United States to be defrauded in that manner.

This question arose in the recent case of United States v. Burkett, 150 Fed. 209. In that case Byers W. Huey applied to make timber culture entry in 1890. He afterwards died and the defendants made some arrangements with his heirs to make bogus affidavits and proofs to get the land. The overt acts were committed in September, 1903. It was claimed by the defendants that as more than thirteen years had elapsed from the date of the entry to the formation of the conspiracy and the doing of the overt acts, that the entry was forfeited, inoperative and dead and could not be supported by the proofs made. In other words, that no proof could be permitted thirteen years after the date of the entry. The Government did not deny that this would be the result if it were true that the entry could not be perfected, but contended that it was possible for the entry to be perfected and therefore possible for the Government to be de-

frauded. In discussing this question, Judge Pollock said:

"If it be true, as contended by counsel for defendants, that the timber culture entry of Huey became dead and of no effect at the expiration of thirteen years from date of the entry under positive provisions of the law applicable thereto, then it is not shown by the indictment that any such entry was in existence at the time of making of the conspiracy or the obtaining and use of the false and spurious proofs in question. Therefore, as the entire object of the conspiracy, no matter how immoral and vicious it may have been, must as a matter of law fail of its purpose to defraud the Government out of its title to the land in question, it sounds to reason and good sense the charge made against defendants must fall of its own weight, as would the charge of forging a mere nudum pactum, and the demurrer must be sustained.

People v. Shall, 9 Cow. (N. Y.) 778."

The Court then proceeded to examine the law with reference to timber culture entries, and the decisions of the Land Office construing the statutes of the United States upon this subject held that notwithstanding thirteen years was the extreme limit of time allowed by the statute from the time of filing to the making of final proof, yet that under the rules of procedure in force in the Land Department, where no adverse claimant intervened and the claimant presented sufficient excuse for delay in submitting his final proofs, that the Land Office allowed such proofs to be made and the Court would follow such ruling, and therefore it was

legally possible for the Government to have been defrauded by the conspiracy, saying:

"It is enough if, under any circumstances, unless interrupted, the conspiracy might have accomplished its unlawful purpose."

Now, if we are correct in this, and the opinions of Judge Field and Judge Dillon, as well as reason and common sense, support these conclusions, what becomes of the case at bar?

The land out of which it was alleged the defendants conspired to defraud the Government is a part of the former Siletz Indian Reservation, and the manner of disposing of it is prescribed by the Act of August 15, 1894 (28 Statutes at Large, 326), which provides that when disposed of under the provisions of the homestead law, the final proof shall show three years **actual residence** on the land as a prerequisite to patent. So that no officer would have any authority to accept proof for a less period of time.

It was claimed upon the trial of this cause that this requirement of three years actual residence might be reduced upon proof that the claimants had served in the Civil War and a great deal of evidence was introduced over the objection of the defendants to the effect that the homestead claimants were soldiers in the Civil War. But this is not the law. The general law relating to homesteads provides for a five years residence and is subject to deductions for military service and other exceptions provided for by law, but the Act which threw this land open to settlement clearly intended to guard against anything of that kind, because it

contains the words "three years actual residence on the land," and this has been the uniform construction of this Act by the General Land Office.

In ex parte Clara M. Allison, the Secretary of the Interior, on October 15, 1902, said:

"The land in question is a portion of the former Siletz Indian Reservation and the manner of disposing of the same is prescribed by the Act of August 15, 1894 (28th Stat. 326), which provides that when disposed of under the provisions of the homestead law the final proof shall show three years actual residence on the land as a prerequisite to patent."

And held that in the absence of this proof the claim should be rejected. The claimant was a widow of a soldier who had served three years during the Civil War.

In ex parte Elizabeth Caplinger, widow of William Caplinger, deceased, the soldier had filed upon the homestead and resided there for a short period of time and then died. The husband had served as a soldier for a period of two years, eight months and twenty-two days in the Civil War, and the widow claimed the right to deduct that period from the three years period of residence required by law. On October 18, 1902, the Secretary, upon review of this claim, said:

"On February 3, 1902, your office rendered a decision denying said petition and holding that the military service of the entryman could not be accepted in lieu of residence in this class of cases, but holding also that cultivation of the land by the

widow or heirs for the required length of time would be considered equivalent to residence. The statute under which the lands in question were opened to settlement (28 Stat. 326) provides that where said lands are disposed of under the provisions of the homestead laws, the final proof shall show three years actual residence on the land. Under this statute, neither constructive residence upon nor cultivation of the land can be accepted in lieu of the actual residence expressly required by the statute. * * * Your said decision, in so far as it helds that the military service of claimant's husband can not be accepted in lieu of the actual residence required by the statute, is correct and is confirmed; but in so far as it holds that cultivation of the land by the widow can be accepted and construed equivalent to such residence, is erroneous and is reversed."

The same rule of decision has been consistently adhered to by the Land Office. These decisions will be found in Letter Book 471-D, pages 273 and 298.

Let us examine the proofs offered in this case with this in view.

The proof of Addison Longenecker, Govt. Ex. 40, page 340, shows that he established his residence upon said land in October, 1900, filed on the same on June 18, 1902, and his final proof was made on September 5, 1902.

The proof of George F. Merrill, Govt. Ex. 43, page 345, shows that he established his residence upon the land in October, 1900; filed June 18, 1902; final proof made September 5, 1902.

The proof of Granville C. Lawrence, Govt. Ex. 102, page 431, shows that he established residence October, 1900, filed June 18, 1902, and final proof was made September 2, 1902.

The proof of James Landfair, Govt. Ex. 127, page 473, shows that he established residence in October, 1900, filed June 18, 1902, and made final proof September 2, 1902.

The proof of Louis Paquet, Govt. Ex. 142, page 499, shows that he settled on the land on November 15, 1900, and it appears from the indictment that he filed on the same on the 3rd day of October, 1900.

The proof of Daniel Clark, Govt. Ex. 243, page 647, shows that he settled upon the land in October, 1900. Filed upon the same June 18, 1902, and final proof was made September 5, 1902.

The proof of Henry M. Riggs, Govt. Ex. 267, page 677, shows that he settled upon his land in September, 1900, filed upon the same on June 18, 1902, and final proof made September 2, 1902.

The proof of William T. Everson, Govt. Ex. 344, page 792, shows that he settled upon said land in October or November, 1900, that he filed upon the same March 2, 1901, and final proof made September 2, 1902.

So it appears that not one of these entrymen proved or attemted to prove that he had resided upon the land for the period required by law and that **there was no possibility of the Government being defrauded by reason of these proofs.** There is no allegation in the indictment and no attempt

made by the evidence to show that there was any conspiracy to persuade the officers of the United States Land Office that these proofs were sufficient. But even if there was, it would not be sufficient, under the doctrine as laid down by Judge Field in the Reichart case and by Judge Dillon in the Walsh case. These proofs were all immaterial and should not have been admitted in evidence, and after having been admitted in evidence are insufficient to support a conviction.

Evidence of Similar Acts.

The indictment in this case charges the defendants with conspiring to defraud the Government out of the claims taken as homesteads by eight different entrymen, but on the trial the Government was allowed to prove, over the objection of the defendants, that a large number of other persons had taken homestead claims under some arrangement with the defendants, namely: John L. Wells, William Teghtmeier, George West, George Rilea, Anthony Gannon, Franklin Hummel, Edward C. Brigham, Henry Marble, Menzo J. Morse, Thomas Johnson, and others, and the final proofs made by them were offered and admitterd in evidence over the objection of the defendants that they were incompetent, irrelevant and immaterial and referred to land and entrymen not described in the indictment and to a transaction not included in the conspiracy charged.

For example, on page 886, witness John L. Wells identified Government's Exhibits 8, 9, 10, 11 and 12, which are the final proof papers of the said John L. Wells. The defendants' counsel then

and there objected on the ground that the same were incompetent, irrelevant and immaterial and referred to land and to an entryman not described in the indictment and relating to a transaction not included in the conspiracy charged and final proof of a homestead claim which was made more than three years prior to the finding and return of the indictment in this case.

The objection was overruled and the exhibits were admitted in evidence. The Court did not limit their admissibility to any particular purpose. With this in view, the defendants' counsel asked the Court, in writing, to instruct the jury as follows: (Page 1040.)

"The defendants in this case are charged with a conspiracy to defraud the United States out of certain of its public lands, the claims filed upon by Daniel Clark, George F. Merrill, Granville C. Lawrence, James Lampheir, Addison Longenecker, Henry M. Riggs, Louis Paquet and William T. Everson, and if you find the defendants, or any of them, guilty of this charge, it must be with reference to one or more of these claims. Certain testimony has been introduced by the Government with reference to certain other land filed upon by other persons than those mentioned in the indictment and heretofore referred to. You cannot find the defendants, or any of them, guilty of the charge in this indictment upon the said evidence of a conspiracy to defraud the United States out of the lands not described in the indictment."

The Court refused to give this instruction, to which ruling the defendants were allowed an exception.

There can be no question that the defendants were entitled to this instruction. The evidence as to other transactions could only be admitted for the purpose of showing intent and design.

Josephi v. Furnish, 27 Ore. 266.

Trapnell v. Conklyn, 37 W. Va. 242.

Winchester Mfg. Co. v. Creary, 116 U. S. 166.

Turner v. Hardin, 80 Ia. 691.

The only question could be as to whether or not the failure to give this instruction was cured by the Court in its general instructions. Upon this subject the Court instructed as follows: (Page 1072.)

"As I have had occasion to advise you during the course of the trial, however culpable you may believe the defendants or any of them, have been with reference to any point testified to and included in this indictment, or however well established you may deem the criminality of any one of them in connection with any offence other than the one charged, you cannot find the defendants, or any one of them, guilty unless you find beyond a reasonable doubt that they have committed the crime of conspiracy as defined in these instructions and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design or knowledge and should be so considered in said relation to the charge under which the defendants are tried."

This instruction does not cover the point at all. Boiled down, it says to the jury: "You cannot convict the defendants, or any of them, of any other

acts than those charged in the indictment. The examination of the evidence of these outside matters tends to establish guilty intent, purpose, design or knowledge, and you should consider it for that purpose." It entirely fails to say, as it should have done, **that they must not consider it for any other purpose.** It permitted the jury to consider it not only for the purpose of showing guilty intent and purpose, but for the purpose of determining the guilt of the defendants upon the main charge for which they were being tried.

The rule which allows evidence of other crimes to be admitted for the purpose of showing intent is a harsh rule at best, but is allowed by the Courts, notwithstanding the undue prejudice which it tends to excite against the defendant. But we think the Courts agree that it should be carefully limited and the jury carefully instructed as to the purpose for which it was admitted.

Josephi v. Furnish, 27 Ore. 266.

Winchester Mfg. Co. v. Creary, 116 U. S. 166.

State v. Lewis, 19 Ore. 481.

Turner v. Hardin, 80 Iowa 691.

Admission of Ex Parte Affidavits Against the Defendants.

During the examination of John L. Wells, as a witness for the Government, and on his re-direct examination, page 900 of the record, he testified that he had given a statement to Mr. Neuhausen, a special agent of the Government, in relation to his connection with the matters upon which he had testified, and thereupon the defendants' counsel, to

whom was handed the written statement by Mr. Heney, cross-examined him as follows:

"I call your attention to this statement in what you said to Mr. Neuhausen: 'According to my recollection it was about July, 1900, when Thaddeus S. Potter, who was at that time occupying an office with W. N. Jones in the Worcester Building in Portland, Oregon, came to me in my office at 100 Grand avenue, Portland, and stated that W. N. Jones had a land proposition concerning which he required to interview me.' Is that correct?"

And the witness answered that it was about correct.

Defendants' counsel further read from the statement as follows:

"He stated the proposition in brief to me, namely, that the aforesaid Jones proposed to advance certain money to a number of soldiers' widows who should file and prove up on homestead claims within the limits of the Siletz Indian Reservation. Mr. Potter further explained that Mr. Jones proposed to give me $5 commission for each soldier's widow. At the conclusion of his remarks Mr. Potter stated that Mr. Jones wished to see me in his office." And the defendants' counsel asked the witness if that was correct and the witness answered, "This is about correct. Yes, sir."

And the defendants' counsel, further reading from said statement as follows:

"Either on the same date on which Thaddeus S. Potter interviewed me or a day after, I called on Jones at his office in the Worcester Building, Port-

land, Oregon, and he stated the proposition to me very much the same manner as Mr. Potter had explained it to me, but he, of course, elaborated the details more carefully," and the defendants' counsel asked the witness if that was correct, and the witness answered "Yes." And thereupon the United States Attorney offered the whole of the said statement made to Mr. Neuhausen in evidence as a statement of the whole conversation had by the witness with Mr. Neuhausen. In response to questions by the Court, the defendants' counsel stated that his purpose in reading the statement to the witness which appears above, was to affect the credibility of the witness, and thereupon the defendants' counsel objected to the offer of the said paper upon the ground that it was incompetent, irrelevant and immaterial, but the Court overruled the objection, and stated that it was admissible on the right of the witness to explain a conversation orally or on paper pertaining to the subject, and admitted the paper in evidence, which is marked Government's Exhibit 25, and was read to the jury as follows: (See Record Page 150.)

"John L. Wells, a citizen of the United States, residing at No. 600 East Ankeny Street, Portland, Oregon, being first duly sworn, hereby on oath deposes:

"I am fifty-eight years of age and a veteran soldier occupying at present the position of Adjutant of Sumner Post, G. A. R., at Portland, Oregon. I served as a private in the Sixth Regiment of West Virginia Volunteers from August 5, 1864, until June 10, 1865, and was discharged at Wheeling, West Virginia. I have resided on the East Side

at Portland ever since I have been in the State of Oregon, a period of about eighteen years, and during all of that time I have served in the capacity of a Notary Public.

"In my double capacity of Notary and member of the G. A. R. I have come in contact with a great many veteran soldiers and veteran soldiers' widows here in Portland, and have had charge of a considerable number of pension matters, etc., for them.

"I have known W. N. Jones, of No. 328 Chamber of Commerce Building, for a period of about ten years or more and had business relations with him for a considerable time before I ever engaged in any land transaction with him. The business relations consisted principally of arranging as fire insurance agent for insuring certain property belonging to him against fire (his residence).

"The first land deal in which I became engaged with the aforesaid Jones was what is known as the location of homestead entries on the former Siletz Indian Reservation. According to my present recollection, it was about July, 1900, when Thad S. Potter, who was at that time occupying an office with W. N. Jones, in the Worcester Building, Portland, Oregon, came to me in my office at 100 Grand Avenue, Portland, and stated to me that W. N. Jones had a land proposition concerning which he desired to interview me; he stated the proposition in brief to me, namely, that the aforesaid Jones proposed to advance certain sums of money to a number of veteran soldiers' widows who should file and prove up on homestead claims within the limits of the former Siletz Indian Reservation under a special act of Congress which had been passed per-

mitting final proof to be made on homestead entries within that territory after a residence of three years. Mr. Potter further explained that Mr. Jones proposed to give me $5.00 commission for each soldiers' widow who should, through my efforts, make a filing upon such homestead. At the conclusion of his remarks, Mr. Potter stated that Mr. Jones wished to see me in his office. Either on the same day on which Thad S. Potter interviewed me, or a day or two thereafter, I called on the aforesaid W. N. Jones, at his office in the Worcester Building, Portland, Oregon. He stated the proposition to me very much in the same manner in which Mr. Potter had explained it to me, but of course, Mr. Jones elaborated the details more carefully. He called my attention to a certain decision in a volume of Copp's Land Laws, said decision appearing to make it unnecessary for soldiers' widows (that is widows of veterans that had served in the Civil War in the Union Army) to reside on any homestead claims which they might take up as such soldiers' widows. Mr. Jones further stated to me that he desired to secure a number of veteran soldiers' widows to file on homestead claims and prove up on the same in accordance with certain conditions which he outlined to me, and he arranged with me that I should receive $5.00 for each soldier's widow that I should induce to file on a homestead claim. The conditions in question were that Mr. Jones was to advance all the expense money to cover the filing fees, cost of trips to and from the Land Office, the final proof payments and other incidental expenses necessary to relieve the veteran soldiers' widows from any expense whatever in connection with said entries.

The idea was that the total expense in each case was to consist of $150 as location fee, $250 to cover the costs of cultivation of the claim, $40 to cover the cost of Land Office fees, filing fees, etc., and $200 extra, making a sum total of $640.00, which total amount was to be secured by a mortgage covering the individual homestead claims.

Under the terms before mentioned, I talked with certain veteran soldiers' widows, among others being Amelia Mullen, Elizabeth Mayer, Louise C. Wendorf, Esther P. Collins, Mary E. Bushong, and possibly Martha Miller, explaining to each of them the proposition and telling them that they would not have to reside on the land, and stating to them that W. N. Jones was the man who was putting up the money for this transaction. I directed each of the women to come to Jones' office and there confer with him further in regard to the matter. I gave each of them his card for that purpose, said supply of cards having been given to me by Mr. Jones for that purpose. The terms outlined above were subsequently, prior to any filing, incorporated in the form of a typewritten agreement prepared by or through W. N. Jones, and a copy of this typewritten agreement is attached to this affidavit. I would like to have it understood that this agreement is the one that was signed by veteran soldiers' widows, and not by veteran soldiers, as the agreement which I will later refer to as having been signed by the veteran soldiers differed in some respects from the one entered into by the soldiers' widows. It is my belief that a number of the veteran soldiers' widows signed the agreement (copy of which is attached to this affidavit) in the office or in the presence of Mr.

Jones. My present recollection is that one or more of these widows signed similar contracts or agreements before me. The only name, however, that I can particularly designate at this time being that of Mary E. Bushong.

As a matter of fact none of the veteran soldiers' widows who filed on homestead claims under this agreement have visited the tracts of land comprised in their respective claims. Several of the widows made final proof on their claims, and my understanding is that W. N. Jones eventually got those claims deeded to him. I do not know who were the witnesses for the women at final proof. I am quite sure the proofs in these cases were made at Oregon City, Oregon. Three or four weeks after I secured the before-mentioned soldiers' widows to file on homestead claims under the agreement with W. N. Jones, before specified, it developed that there was not enough widows to go around; in other words, there were more tracts of land than there were widows that were available as entrywomen. Mr. Jones thereupon told me to get veteran soldiers who had served at least two years in the Union Army, his idea being that veterans with such service could deduct the two years time from the three years specified by the Siletz Reservation Homestead Act as the necessary period of residence of claims within that territory. Mr. Jones either drew up or had drawn up a new form of contract similar in its main features to the one which had been signed by veterans' widows and differing from the same mainly in so far as the total amount made payable to Jones for the entire cost of obtaining the claims was designated as $520 (in place of $440, as in the case of the soldiers' widows) and the mortgage to be given by

the veteran soldiers was in the sum of $720 and formed an incumbrance on each homestead claim. My arrangement with Jones in regard to my remuneration for obtaining veteran soldiers to file in accordance with his said terms was the same as in the case of the soldiers' widows, namely, I was to receive $5.00 for each veteran soldier who should, through my influence, be induced to file upon a homestead claim within the confines of the former Siletz Indian Reservation. Among the veterans who filed at my solicitation were Anthony Gannon, Joseph Gillis, Thomas Johnson, George Rilea, Oliver I. Conner, Franklin Hummel, Edward Brigham, George F. Merrill, Granville C. Lawrence, Henry M. Riggs, James Landfair, William Tightmeier, Addison Longenecker, and Daniel Clark. A great many of the parties named signed contracts of the nature before explained before me either in my office or in their homes or on the street or wherever I could strike them.

I filed on one of these homestead claims myself, and sometime after I made final proof, I signed a warranty deed in blank and turned same over to W. N. Jones, for a consideration of $200 which I received at his office in the form of a check which I cashed at the East Side Bank, Portland, Oregon, according to my best recollection. I have today learned for the first time that when the said warranty deed was filled out W. N. Jones was not named as the grantee and that another party's name was put in the deed and recorded as that of the grantee. Several of the veterans mentioned have to my own personal knowledge made similar transfers of their claims to Jones and in one or two instances transfers have been made to R. B. Mon-

tague, of Albany, Oregon. Each of the veterans before enumerated gave a mortgage to W. N. Jones, in the sum of $720, with his individual homestead as security, shortly after making final proof. I acted as witness at Oregon City, before the U. S. Land Office, in three or four cases where veteran soldiers proved up on their claims. I acted as proof witness at the final proof of William Tightmeier, Joseph Gillis, and George Rilea, and possibly one more.

Whenever a contract was signed I was careful to deliver the contract to W. N. Jones or Thad S. Potter, his representative, and none of the veterans was allowed to retain a copy of the contract. A number of the veteran soldiers signed mortgages in favor of W. N. Jones before me and I took their acknowledgments, and attached my notarial seal to said mortgages. I am quite sure that I did not take the acknowledgements of any of the veteran soldiers to deeds conveying title of their claims to W. N. Jones.

My recollection is that I made five trips from Portland to the homestead claim that was entered in my name. On one of these trips I was accompanied by my wife; on that occasion she and I remained on our supposed claim three (three scratched through and the word "two" written) days. On the other four trips I was on my claim each time for a period of five or six hours, more or less. A cruiser named Danforth built all the cabins on the claims on which the veteran soldiers were located. In October ("October" scratched through and "August" written), 1900, I made my first trip to the land in company with about a dozen other

veteran soldiers; the party being guided or led by Thad S. Potter, who, as the representative of W. N. Jones, paid all expenses for railroad fare, hotel bills at Toledo, team hire to and from the land, etc., the total sum of money that I got out of this deal with W. N. Jones was about $325.00 or thereabout, this total sum being made up of $200 individual profits on my own homestead claim and about $5.00 each for 25 veteran soldiers and widows who filed on homestead entries at my solicitation. I was a witness at the final proof made by William Tightmeier on his homestead entry at Oregon City, as before stated, although I had no personal knowledge of any facts regarding his residence, or lack of residence on his said homestead claim. When I testified as final proof witness for him I did so with the understanding that he had actually been on his claim, although I have since learned that he, himself, swears that he never got any closer to his alleged homestead claim than the town of Toledo, Oregon, which is located about eighteen miles distant from said claim.

JOHN L. WELLS.

Witness:

ODELL T. FELLOWS.

Subscribed and sworn to before me this 16th day of March, 1905.

THOMAS B. NEUHAUSEN,
Special Agent in Charge Second District."

Was this paper properly admitted in evidence?

The witness had testified in his direct examination, on page 37, that Mr. Jones had introduced him to Mr. Potter, and that he was not personally acquainted with Potter, although he had known of

him for a number of years. These extracts from the Neuhausen statement were called to the attention of the witness for the purpose of showing that they were contradictory to his testimony on the witness stand. That is to say, his testimony as a witness was to the effect that Jones introduced Potter to him, while this statement which the witness admits he made to Neuhausen, showed that Potter was the first one to interview him and that the preliminary arrangements were all made with Potter. This was not very material except to show that the witness had made contradictory statements concerning these matters.

Did this entitle the Government to introduce the entire statement to Neuhausen in evidence?

It will be noticed that the defendants did not introduce the document, or any portions of it, in evidence. They only used it as a basis for a cross-examination of the witness. The witness would, of course, have been entitled to see the document before answering the question if he had requested it, but he did not do so. Even though he had done so and had refreshed his memory from it, this would not have made it admissible as evidence.

Says Mr. Wigmore: "It follows from the nature of the purpose for which the paper is used that it is in no sense testimony. In this respect it differs from the record of best recollection which is adopted by the witness as the embodiment of his testimony, and as thus adopted becomes his present evidence and is presentable to the jury. Nevertheless, though the witness' party may not present it as evidence, the same reason of precaution which

allows the opponent to examine it allows him to call the jury's attention to its features, and also allows the jurymen, if they please to examine it for the same end. In short, the opponent but not the offering party, has a right to have the jury see it. That the offering party has not the right to treat it as evidence by reading it, or showing it or handing it to the jury, is well established. That the opponent may do this, or that the jury may of its own motion demand it, is equally conceded."

Wigmore on Evidence, Sec. 763.

In Railroad Co. v. O'Brien, 119 U. S. 99, an affidavit made by a physician as to the condition of plaintiff which he testified was correct and made by him at the time of examining the plaintiff, was admitted in evidence and the case was reversed for that reason. The Court says:

"It does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of ever essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury. * * * It is, however, claimed in behalf of the plaintiffs that in his answers to their interrogatories, the physician testified apart from the certificate and the material facts embodied in it, and therefore the reading of it to the jury could not have prejudiced the rights of the defendant and for that reason should not be a ground of reversal. We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury in estimating the

damages to be awarded in view of the extent and character of the injuries received. The jury, for aught that the Court can know, may have been largely controlled by its statements. The practice of admitting the unsworn statements of witnesses prepared in advance of trial at the request of one party and without the knowledge of the other party should not be encouraged by further departure from the established rules of evidence."

That the defendants were entitled to question the witness about this statement cannot be denied.

In Chicago, Milwaukee & St. Paul Railway Co. v. Artery, 137 U. S. 507, it is said:

"A written statement signed by a witness containing statements different from those testified to by him, can be used on his cross-examination to impeach him. It is not necessary to call as a witness the person to whom or in whose presence the alleged contradictory statements were made."

It was further held that where portions of the paper were read to him and he was asked "Is that statement correct?" it was error to exclude his answer.

But does that give the Government a right to introduce in evidence all of his written statement?

It seems clear to us that it does not. The Court admitted it upon the ground that they were entitled to all of the conversation. If that were true that would not justify the admission of this paper. They could have asked the witness the circumstances under which he made the statement, asked him if he was positive that the statement in writing was cor-

rect, he could have refreshed his memory from the writing and could have testified as to the conversation fully, but that would not justify the introduction of the writing. He would not have been entitled to have testified to all of the conversation, but only so far as it was pertinent to explain the apparent contradiction in his testimony.

Mr. Wigmore, in his work on Evidence, Sec. 2113, under the title "Rules of Completeness," and discussing the question as to whether or not the whole of the utterance may afterwards be put in by the opponent, lays down these rules:

"(a) No utterance irrelevant to the issue is receivable.

(b) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable.

(c) The remainder thus received merely aids in the construction of the utterance as a whole and is not in itself testimony."

In Sec. 2115, Mr. Wigmore says:

"The general phrasing of the principle then is that when any part of the oral statement has been put in evidence by one party, the opponent may afterwards, on cross-examination or re-examination, put in the remainder of what was said on the same subject at the same time."

It will probably be contended that this statement, even though inadmissible, was not injurious to the defendants. The case quoted from the Supreme Court of the United States, O'Brien v. Rail-

road Co., 119 U. S. 99, is a complete answer to this argument, and if that was true in a case involving simply a question of money damages, how much more is it true in a case involving the liberty of the defendants. Furthermore, there is a great deal in this statement which was not covered by the direct testimony of the witness and it was not admissible at all. For instance, in the Neuhausen statement, the witness says: "Several of the widows made final proof on their claims and my understanding is that W. N. Jones eventually got those claims deeded to him." Again he says: "When I testified as final proof witness for him (William Tightmeier) I did so with the understanding that he had actually been on his claim, although I have since learned that he himself swears that he never got any closer to his alleged homestead claim than the town of Toledo, Oregon, which is located about eighteen miles distant from said claim."

The question in controversy, so far as the impeachment of the witness was concerned, related simply to the fact as to whether Mr. Jones introduced the witness to Potter or whether Potter introduced him to Jones. These statements referred to had no bearing upon that question whatever, but were highly injurious to the defendants and were not admissible upon any theory. Certainly the witness could not have been permitted to testify that he understood that Mr. Jones had secured deeds from these widows. Can he introduce such testimony so highly prejudicial under the guise of getting in all of the statement? Suppose the witness had stated to Neuhausen that he had heard that Jones was a murderer and a bigamist, or that he

had been informed that Jones had stated that he was guilty of the charge mentioned in the indictment. Will it be contended that this evidence could have been admitted under the guise of getting the entire conversation? We think the question answers itself.

Thus far, we have been discussing the question upon the theory apparently held by the Court in admitting the paper. We now propose to discuss the real question as it appears by this record, namely: Did the fact that we inspected this document make it admissible as evidence?

In England the rule was formerly held that it did so, as is shown by Wigmore on Evidence, Sec. 2125. He further shows, however, that there never was any reason for the rule and that it is unsound. The alleged reason for the rule was a desire to penalize one party for attempting to know beforehand the tenor of the evidence in possession of the other party. Says Mr. Wigmore:

"The answers to this plausible suggestion were plain. First, the very principle whose evasion was thus penalized was itself unfair and reprehensible. Its vices have been already considered. (Sec. 1847.) It is enough here to repeat that the common law notion of keeping a party entirely ignorant of the evidence possessed by his opponent, was one to be discountenanced, not maintained. Moreover, by a bill of discovery in equity, such documents could have been obtained even under the common law system, and similar statutory proceedings at law now are authorized almost everywhere. Thus, by the judgment of posterity and by the contemporary

standards of equity, the penalty of the present rule was in truth imposed upon a party who was attempting to do no more than justice and good sense entitled him to do, namely, inform himself at the trial of the documentary evidence available against him. * * *

There is then, not only no sound reason for establishing such a penal rule, but it is itself open to abuse and merely adds to the sportsmen's rules elsewhere noticeable in the common law system. Moreover, it is totally out of harmony with the modern statutory procedure for discovery at law."

The rule has been abandoned in England. In Parnell Commissions Proceedings, Times Report, Pt. 25, page 169, President Hannen:

"The important fact of their having called for it does not alter the matter at all. You produce it. If they do not put it in you are not on that ground entitled to put it in. You have met their challenge. That is what it comes to."

Some of the American Courts have adopted the old English rule. The authorities upon this question are thoroughly reviewed in the case of Austin v. Thompson, 45 N. H. 113. That able Court refused to follow the rule, saying:

"We see no sufficient reason for a rule that is at variance with the general course of our practice and that can hardly facilitate the administration of justice, since if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the Court to allow incompetent evidence to go to the jury."

After reviewing the authorities, the Court again says:

"There is, therefore, no such weight of authority as should lead us to adopt a rule which does not commend itself to our judgment and is not in accordance with our practice in analogous cases."

In Eugene Smith, Executor, v. Fredericka Rentz, 15 L. R. A. 138, the Supreme Court of New York reviewed the authorities upon this question and refused to follow the so-called rule. The Court says:

"The claim that it gives the party calling for a paper an unfair advantage if he may inspect it and then decline to put it in evidence, seems to us rather specious than sound. The same objection would lie in cases of bills for discovery; but it was the settled rule that an answer, though under oath, was evidence only for the party who obtained it. The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If on inspection, the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party. The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice."

In many States the so-called rule has been abol-

ished by statute. In Oregon, Sec. 772, B. & C.'s Code. In California, C. C. P., Sec. 1939.

But even if the Court should be of the opinion that this rule of evidence is in force, this document was not properly admitted, because the rule only applied where the document was produced upon notice or by a subpoena duces tecum and did not apply to a case where the paper was voluntarily given to the opponent, as was in this case. The record shows, page 900: "Thereupon the defendants' counsel, to who was handed the written statement by Mr. Heney, examined the witness," etc.

This question was before the Supreme Court of Pennsylvania in the case of the Farmers & Mechanics Bank v. Israel, 6 S. & R. 292, and was squarely decided. The Court said:

"The other point insisted on at the trial, that a paper handed to the opposite counsel, pursuant to a request, becomes competent evidence for both parties, although it were incompetent before, has very properly not been pressed. Admitting for the sake of the argument, that books delivered and inspected, after being called for, become evidence as well for the party producing them, as the party calling for them, although they would be otherwise incompetent, yet the reason of the rule shows its extent. A party would have an unreasonable advantage, who could use the arm of the Court to wring his antagonist's books out of his hands and use them against him, or not, as they might be found to answer his purpose; and he must, therefore, according to the English practice, either not have recourse to the measure at all, or take it at the risk of making

the books evidence at all events, and for both parties. Here, however, there was no call, either for books, or through the Court, but a mere request with which the other party was not bound to comply; and the production of the paper as an act of courtesy, cannot change its character, as to competency. There must be judgment on the verdict."

This would seem to be decisive. All of the cases upon this subject referred to in the books seem to be civil cases. We have not, so far, been able to find a case where this was attempted in a criminal case and it seems to us that this would present a somewhat different question. The Constitution provides that a defendant is entitled to meet his witnesses face to face. In this case, let us assume for the sake of argument, that every witness who testified had made a similar statement to Mr. Neuhausen and that at the trial these statements were in possession of the Government and lying on the table. The defendants' counsel had asked permission to examine them, which was granted. As soon as this was done, the District Attorney could introduce them all as evidence and rest his case without putting a single witness upon the stand. Would not this be in violation of his constitutional rights to meet the witnesses face to face? The defendant could be denied the opportunity of cross-examining the witnesses whose testimony had convicted him. It seems to us that the mere statement of the proposition is sufficient.

There is still another reason why this was not admissible, namely: its execution was not proven. Certainly it cannot be contended that it was entitled to admission without proof that it was the

paper or statement which the witness had made to Mr. Neuhausen, and the one which he signed; but no evidence of that kind was offered.

Says Mr. Wigmore, in note to Sec. 2125:

"When a document is called for and the opponent produces it from his possession, the execution of it remains to be proved. This mere production by the opponent is not a waiver or proof of execution and the party calling for it is still obliged to prove its execution. (Ante Sec. 1298.)"

In the section last cited, Wigmore, Sec. 1298, the learned outhor goes on to show that there was formerly a contention made that where one party produced a paper for the inspection of the other, that the party inspecting the same might assume it to have been properly executed because found in the possession of the opposite party. He shows that there was some fluctuation of opinion, but that this doctrine has been entirely repudiated.

The law, then, is that we could not have introduced this document without first proving its execution. Certainly, then, the parties who produced it could not do so.

Government Exhibit No. 26.

In Government Exhibit No. 25, just referred to, there is a statement that "a typewritten agreement was prepared by or through W. N. Jones, and a copy of this typewritten agreement is attached to this affidavit." After Exhibit 25 was admitted, the United States District Attorney offered a paper which he claimed was the paper referred to in Exhibit 25 as being attached thereto. The defendants'

counsel objected to the paper because it was incompetent, irrelevant and immaterial. The paper was introduced in evidence, and is as follows: (See Record Page 867.)

"THIS AGREEMENT, Made this ——— day of ———, 1900, between ————————, of Portland, Oregon, the party of the first part, and Thad S. Potter, the party of the second part, WITNESSETH:

That, whereas, the party of the first part is entitled to the benefits of the Act of Congress of June 8, 1872 (Sec. 2307, Revised Statutes), giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children, and desires to avail herself of the privilege therein granted by taking a homestead claim, and the party of the second part is in the possession of information relative to the existence of public lands within the State of Oregon, subject to entry;

Now, therefore, the party of the second part in consideration of the covenants and agreements on the part of the party of the first part, hereinafter stipulated to be kept and performed hereby agrees to give to the party of the first part information which will enable her to locate and file a homestead claim upon 160 acres of the public lands of the United States, situated within the State of Oregon, and the party of the first part hereby agrees to pay to the party of the second part, as compensation for such information, and for his services to be performed in the preparation of the papers and affidavits necessary to be prepared and used in making such filing, the sum of one hundred and fifty dollars

to be paid at the time and in the manner hereinafter designated.

The party of the first part further agrees to employ and does hereby employ the party of the second part to cultivate the land to be taken up under the foregoing agreement or so much thereof as is required and for the time required by the laws of the United States, in order to perfect title thereto, and to pay the said party of the second part therefor the sum of two hundred and fifty dollars, to be paid at the time and in the manner designated; and the party of the second part hereby accepts said employment, and agrees to do and perform or to cause to be done or performed all work and labor necessary to be done and performed, upon said premises in order to comply with the laws of the United States.

The party of the second part hereby agrees to advance to the party of the first part if required, the amount of fees required at the U. S. Land Office in order to make and perfect such filing, and all such necessary expenses of the party of the first part in connection therewith not to exceed the sum of forty dollars, and the party of the first part agrees to re-pay to the party of the second part all sums of money so advanced at the time and in the manner hereinafter designated.

The party of the second part further agrees that after final proof shall have been made upon said claim he will, at the option of the party of the first part, procure for the said party of the first part a loan not to exceed the sum of $640.00, to be secured by said mortgage upon said claim, and immediately upon procurement of such loan all sums of money

herein stipulated to be paid to the party of the second part by the party of the first part under the terms of this agreement, together with all sums advanced to the party of the first part, by the party of the second part, under the terms of this agreement shall become due and payable and shall be paid out of the loan so secured and it is further understood and agreed by and between the parties hereto that the payment by the party of the first part to the party of the second part of all sums of money hereinbefore designated shall be conditional upon the procurement by the party of the second part of the loan hereinbefore mentioned, if the same shall be required.

In case the party of the first part shall not desire to avail herself of the loan hereinbefore mentioned, then and in that event, all moneys advanced to the party of the first part by the party of the second part under the terms of this agreement, together with all sums of money hereby agreed to be paid to the party of the second part by the party of the first part shall become due and payable as soon as final proof shall have been made upon said claim.

WITNESS our hands the day and year first above written.

Witnesses:"

The statement, Exhibit 25, goes on to say that a number of soldiers' widows signed agreements similar to this in the presence of the witness and Mr. Jones.

Now, this paper, Exhibit 26, taken in connection with the statements contained in No. 25, proves, if it

proves anything, that Jones had, at a previous time to that mentioned in the indictment, been engaged in a scheme or conspiracy to defraud the Government out of some other lands by using the widows of soldiers to do so. If the evidence had no such tendency and did not indicate any guilt or wrongful act upon the part of the defendant, then it was open to the objection that it was immaterial, and ought not to have been admitted for that reason. But the District Attorney evidently thought that it had a tendency to show the very thing which I have mentioned, namely: That Mr. Jones had been engaged in some other scheme to defraud the Government.

Now, if that is true, by what right is this paper introduced in evidence? No witness has testified in Court that Mr. Jones had anything to do with it or ever saw it, but the sole basis for its introduction is the statement made in the Neuhausen statement of Mr. Wells, which we think we have conclusively showed was not admissible. But even though it were admissible because we had inspected it, the statements contained therein certainly could not form the foundation for the introduction of other documents.

Again, the only possible theory upon which Exhibit 25 was admissible, as we have shown, was that we had inspected it. We did not inspect No. 26 and therefore it could not be admissible upon that ground. If the learned District Attorney had wished to bind us by our inspection of it he should have submitted it with the other paper for our inspection. He certainly cannot give us a part of a paper to be inspected and then introduce another separate part upon the ground that we have in-

spected it. As will be plainly apparent from the record, however, neither the District Attorney nor the Court put its admission upon that ground, but only upon the ground that having asked for a part of the conversation between Wells and Neuhausen, they were entitled to have all of that conversation. How does that make admissible a paper prepared by Mr. Jones and given to Mr. Wells? It certainly is not a part of the Wells-Neuhausen conversation.

The Government offered in evidence a paper signed by George F. Merrill, Government's Exhibit 41, page 949, which was and is as follows, to wit:

"In re Homestead number 14,234, made June 18, 1902, by George F. Merrill, for N. E. ¼ S. W. ¼ N. ½ S. E. ¼ Sec. 32 and N. E. ¼ S. W. ¼ Sec. 33, Tp. 8 S. R. 10 west, Final Certif. No. 6567, dated Sept. 8, 1902.

State of Oregon, County of Multnomah—ss.

George F. Merrill, being first duly sworn, upon his oath deposes and says that he is seventy-two years of age, and that his family consists of a wife and six children, that he is by occupation a boat-builder, and has resided in Portland, Ore., and vicinity for the last past twenty-two years, that he is the same person who made the above homestead filing and entry on date of June 18th, 1902; that the improvements on said claim consist of a split shake house about 14x16 feet square with shake roof, one door, one four-light window, but without floor or fireplace, and no place for the escape of the smoke, about one-half acre slashed and fenced with brush, no cultivation except a small patch which was planted to garden truck for one season. That the

total value of all the improvements on said claim would not exceed $100.00; that he first went upon said land in Oct., 1900, at which time he camped on the claim for one night and one day, that there was no house on the claim at that time, that he next visited the claim in March, 1901, remaining for one day and night, that the next and last visit to the land was on date of Sept., 1901, for a period of one day and night, that he started to make another visit to his said claim during the month of March, 1902, and after going as far as 'the new landing' on the Siletz River, which is about six or eight miles from the claim, that he could proceed no farther on account of a heavy storm. The witness here interrupting said There is a little difference there. They got that—it ought to be 1901, we couldn't get down there—they got it March, 1902. Mr. Heney continuing "and that he has not in fact been on the claim since his visit in Sept., 1901. That between the dates of Oct. 9, 1900, and April 5, 1901, he went to John L. Wells' office in Portland, Oregon, to have his pension papers filled out, and at that time and place he entered into an agreement or contract, as he thinks, with W. N. Jones, through John L. Wells, who, as he understood, was acting as agent for said Jones, in which it was agreed in said contract that said W. N. Jones was to make certain improvements upon said claim and pay all the expenses of the claimant in going to and from said claim, and it was further understood that when the claimant had made final proof on his said claim he was to receive from said Jones the sum of $200 and execute a mortgage on his said entry to said Jones for the sum of $725, that Jones made, or caused the improvements to be made, on said claim, and paid all other ex-

penses of the claimant as agreed upon, and on date of Sept. 8, 1902, claimant exectued a mortgage to said W. N. Jones for the sum of $725, at which time the said Jones paid the same claimant the sum of $200.00.

Deponent further says that he received official notice from the Oregon City Land Office that his said entry had been contested by J. F. Clark, that some time after receiving the notice of this contest, W. N. Jones came to him, at which time it was agreed that said Jones was to look after the claimant's interests in said contest, and that he, the claimant, executed a second mortgage to said W. N. Jones, for the sum of $200 for that purpose. The claimant did not appear at the hearing of said contest, and that he did not pay or authorize said Jones or any other person to pay any sum of money to have contest proceedings withdrawn against his said homestead.

Deponent says that he has no knowledge of his said claim having been contested by C. H. Young on March 14, 1903, or by E. R. Miller on May 2, 1903, and that he never authorized any person or persons whomsoever to act or appear for him in relation to any contest against his said claim except that brought by J. F. Clark on date Nov. 29, 1902.

GEORGE F. MERRILL.

Witnesses:
LOUIS F. ALLEN.
S. J. BURNS."

The witness testified that he had made a statement to Hobbs and that afterward he went to Mr. Jones' office and signed a paper asking for a rehearing of his case. In that paper, which is Gov-

ernment's Exhibit 61, the witness refers to a report made by Special Agent A. J. Hobbs, as follows:

"On March 10, 1904, Special Agent A. J. Hobbs transmitted a report, accompanied with affidavits of entryman and his two witnesses acknowledging false swearing in the testimony given at time of proof and alleging that entry was made at instance of and for the benefit of one W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by said Jones."

This is the only excuse for the introduction of this paper, Government's Exhibit 62. In what way did that make Exhibit 62 admissible? It was made ex parte, not under oath, not in the presence of either of the defendants. It was not called for by either of the defendants. The Government was not asked to produce it at the trial. No question was asked of the witness about his conversation with Hobbs, as was the case with reference to Government's Exhibit No. 25, and we are utterly unable to conceive of any theory which would make this paper admissible. If the Government has one we should be glad to be informed as to what it is.

If it is admissible against the defendants, then it is hard to conceive what kind of a statement made by any of the entrymen would be inadmissible. It was highly injurious to the defendants, as an inspection will readily show. It shows that very little cultivation or improvements were on the land and that the witness had only visited his claim a few times and remained there but a short time at each visit, and all tends to support the theory of the

Government. It may be said that the defendants were not injured because the witness testified upon the stand to substantially the same statements as are made in this affidavit. Is it true that the testimony of the witness may be strengthened by showing that at other times he has told substantially the same story as he tells upon the witness stand? If so, the answer is a good one. Otherwise not. If this was admissible, then the Government had a right to call witnesses who had conversations with Mr. Merrill about the character of his improvements and the length of his stay, etc., and show by them that Mr. Merrill had at other times and other places told substantially the same story, and thus impress upon the jury the truth of his statements.

We shall not dignify this question by arguing it further. We submit that there is no reason and no authority that will, under the most strained construction, justify the introduction of this evidence.

The Government called one Daniel Clark as a witness. He is one of the homesteaders mentioned in the indictment and his proof is assigned as one of the overt acts. He testified, amongst other things, that he had made a statement to Mr. Hobbs, an Agent of the Land Department, and that he afterwards went to Mr. Jones' office and signed another paper. He identified his signature to the paper and it was then offered and admitted in evidence over the objection of the defendants that it was incompetent, irrelevant and immaterial, and was marked "Government's Exhibit 263," and is as follows, to wit: (See Record Page 675.)

"Govts. Ex. 263.

Portland, Oregon, May 13th, 1904.

Honorable Commissioner,
of the General Land Office,
Washington, D. C.

Sir:

Special Agent A. J. Hobbs, has served me with a notice of suspension of my Homestead entry No. 14233 in the Oregon City, Oregon Land District, in accordance with your letter of ——— ,1904, to the Register and Receiver, in which letter it is stated:

"On March 10th, 1904, Special Agent A. J. Hobbs, transmitted a report accompanied with affidavits of entrymen and his two witnesses, acknowledging false swearing in the testimony given at the time of proof and alleging that the entry was made at instance of and for the benefit of one, W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by said Jones."

I deny that I swore falsely at final proof, or that I took the land for one, W. N. Jones, or for the benefit of any person or persons other than myself. I assert that I complied with the law in regard to residence as well as I was able to do, considering the broken country, the unfavorable winter climate, lack of roads, and distance from supplies, and the age of myself and wife. Although the actual building of my house, the clearing of some of the land, and the construction of trails, and the cultivation of some of the land for two seasons, was performed by others, because of the fact that on account of age I was physically incapable of doing such manual labor,

yet all the work was done at my express desire and direction and paid for by me after final proof by a mortgage on the land. I understand that the regulations of the Department permits this to be done. I believe that Special Agent Hobbs has never made a personal examination of my claim.

For the foregoing reasons and facts, I respectfully ask that you set a time and place of a hearing in order that all parties in interest may be heard, to the end that the title to my homestead may be settled and the patent issued.

Very respectfully,

DANIEL CLARK."

It is possible that this paper was competent as against the defendant Jones, but it was offered and received against all of the defendants, including, of course, the defendant Potter. The Court will notice that it is dated May 13, 1904, one year, eight months and eight days subsequent to the final proof. It was an act of one of the alleged conspirators only long after the purpose of the conspiracy had been accomplished so far as contemplated by the alleged conspirators. The allegation is that they were to defraud the Government by means of the false proofs and that in pursuance thereof the defendants procured the homesteaders to make the false proofs on the 5th of September, 1902. The law is, of course, well settled that no act of a conspirator binds his co-conspirators after the completion of the conspiracy.

This being true, we are unable to see how this action of Jones was admissible as against the defendant Potter.

After the admission of this document, the District Attorney then called the attention of the witness to a paper and the witness identified his signature thereto and the same was offered in evidence and marked Government's Exhibit 264. When this paper was offered the defendants' counsel stated to the Court that if it was made for the purpose of impeachment, they objected on the ground that the United States Attorney could not offer evidence impeaching his own witness, unless he first showed surprise. That if it was offered for the purpose of corroborating him, it was incompetent for that purpose, and if it was offered as substantive evidence in the case it was incompetent and hearsay. Thereupon the United States Attorney said to the Court that it was not offered to impeach the witness, not offered to corroborate the witness and it was not offered as substantive evidence in the case. Further explaining, he stated that the offer was not made as substantive evidence of facts stated in the affidavit, but as circumstances to be considered by the jury in connection with the circumstances of the other paper having been signed by Jones. The objection of the defendants was renewed on the ground that the paper was incompetent and irrelevant, but the Court overruled the objection and admitted the paper as against the defendant Jones only, and to this the defendants excepted and their exception was allowed. The defendants also objected that it was not shown that Mr. Hobbs, the Special Agent of the General Land Office, had any authority to administer the oath. The District Attorney offered no evidence to show that he did have such authority, but claimed that he had been directed by the Commissioner of the General Land Office or the Secre-

tary of the Interior to investigate these claims and that this gave him authority to administer an oath. Said Exhibit 264 is as follows: (See Record Page 1011.)

"In re H. E. No. 14233, for N. E. ¼ S. E. ¼ Sec. 33, and N. ½ S. W. ¼ S. E. ¼ S. W. ¼, Sec. 24, T. 8 S. R. 10 West, made June 18, 1902,

by

Daniel Clark.

State of Oregon, County of Multnomah—ss.

Daniel Clark being first duly sworn deposes: My age is 61 years, my occupation that of a day laborer, working at various kinds of light work; my residence and postoffice address is Portland, Oregon; I am a man of family, consisting of a wife and five children, and that myself and family have resided in the City of Portland, about seventeen years, and have resided there continuously for the last past seven years; that I am the same person who made the above described entry on June 18, 1902, and made my final proof thereon before the County Clerk of Lincoln County, Oregon, on September 5, 1902, that the improvements on my said homestead consist of a split shake house, no floor or fireplace nor any place for the escape of smoke; that there is about one or one and one-fourth acres slashed on the same homestead and that a small patch of ground of a few rods square has been dug up and been planted in garden vegetables for one season; that the total value of all improvements on said homestead would not exceed $100.00; that all the improvements on said claim and what cultivation was done on the claim was done by or at the instance of one, W. N. Jones, of Portland, Oregon.

Deponent further states that he made three visits to said land, making the trip each time from his home in Portland, Oregon, as follows:

One visit in October, 1900, one visit each in March and September, 1901, that he remained on the land one day and one night at each visit thereto, making a total of three days and nights in all, which comprises the time spent by him on said claim; that his family nor any of them have never been upon the land for the reason that his wife is an invalid, and could not go to the claim to reside thereon; that he made an attempt to reach the claim in the month of March, 1902, but on account of high water and a heavy storm which was raging at the time, he was unable to proceed further than what is known as 'Canoe Landing' on the Siletz River, which is about six or eight miles from the said homestead, from which point he was compelled to return to his home in Portland, Oregon, which is more than one hundred miles away.

Deponent further states that between the date of October 1st, 1900, and April 30th, 1901, he entered into a contract with W. N. Jones of Portland, Oregon, which contract was made through John L. Wells, and at said Wells' office in Portland, Oregon, in which contract it was agreed that said Jones was to make all improvements required by the Government on said claim and was to pay all of the entryman's expenses in going to and from Portland, Oregon, to his said homestead; that said Jones did make or cause to be made all the improvements and cultivation that was ever made on said claim. That claimant was to go upon the claim at least once in

every six months until final proof has been made on the claim, at which time the claimant agreed to execute and did execute a mortgage to said Jones on his said homestead for the sum of $720.00, at which time the said W. N. Jones paid said claimant in cash, or a check, the sum of $200.00. That all the expenses of making the filing, going to and from Portland, Oregon, to my said claim was paid by W. N. Jones, or J. L. Wells for said Jones. Claimant reserved the right to pay off the mortgage given to said W. N. Jones at any time.

That about the latter part of December, 1902, or the first part of the year 1903, he received official notice from the U. S. Land Office at Oregon City, Oregon, that his claim had been contested by one, J. F. Clark. That at the time set for the hearing in said case, he went to the United States Land Office at Oregon City, Oregon, but that he never gave any testimony in the case, and does not know that any hearing was had in the case. That he saw Mr. W. N. Jones at Oregon City, Oregon, on that day, but does not know what action, if any, was taken by W. N. Jones, or any one else, or what disposition was made in the contest of said Clark. That he did not employ any attorney to look after the matter for him, and never paid, or authorized any person or persons to pay anyone any sum of money to withdraw any contest brought against his said entry by J. F. Clark or any other person. That he never had any knowledge of his said homestead having been contested by C. H. Young on March 4, 1903, or by R. W. Tompkins, on May 2, 1903. That he never received notice of such contests, and that whatever might have been done, if such contests were initiated

against said claim, was so done without his knowledge.

DANIEL CLARK.

Witness:
WM. ALBERS.

Subscribed and sworn to before me this 4th day of March, 1904.

A. J. HOBBS,
Special Agent G. L. O."

With reference to the admission of this paper, the Court will notice that it has not the excuse for its admission that was made for the admission of the statement of Wells and of Merrill.

In the statement made by Wells to Neuhausen, it was claimed that it was admissible as a part of a conversation between Neuhausen and Wells concerning which the witness had been questioned by the defendant.

In the Merrill paper, Government's Exhibit 41, page 949, there was a statement referring to another paper which it was claimed made it admissible, but this paper has no such reason for its admission. It is simply an ex parte statement made out of Court long after the final proof which was to be the consummation of the conspiracy, made before an officer who, so far as appears, had no authority to administer an oath, though we apprehend that would not make much difference, and if its admission can be justified there is no kind of an ex parte statement that is not admissible, as against a defendant.

We are curious to know what reason the learned counsel for the Government will assign for the in-

troduction of this paper. He stated that it was not for the purpose of impeachment, and that it was not for the purpose of corroborating the witness and was not offered as substantive evidence in the case, but only as a circumstance. If this can be upheld then all that will be necessary to procure the admission of any evidence of any kind in a criminal case, will be to call it a circumstance.

It will probably be urged that it did not injure the defendants. As observed with reference to the other documents of this character, if it contained statements damaging to the defendants it was injurious, and if it contained no such statements it was immaterial and ought not to have been admitted. The presumption is that it was injurious. There is, however, a statement in this document that is very injurious to the defendants, and that is the following: "That claimant was to go upon the claim at least once in every six months until final proof has been made on the claim." The written agreement between Mr. Jones and this witness, which is in evidence, Government's Exhibit 26, page 900, contains no such provision, but provides that he was to comply with the law with regard to residence in every respect. The witness is on the stand in the trial of this cause and testifies to no such agreement, either with Mr. Jones or anyone representing him, but in this document they get the evidence before the jury that there was an understanding or an agreement with Mr. Jones that the witness only had to go upon his claim once every six months. This, taken in connection with the Court's instruction as to the requirements of residence and cultivation, was a very damaging statement for the defend-

ant, and we submit that its admission was a grave error.

Is Evidence of the Acts of a Third Party Not Connected With Defendants Admissible for the Purpose of Raising a Presumption Against Them?

John Miseck was called as a witness, page 915, and testified that he was Postmaster at the postoffice called Roots; that he built certain cabins on the land in controversy for Mr. Jones and was paid by Mr. Potter or Mr. Jones. **That he did not remember having any talk with Mr. Jones in regard to the mail.** That as Postmaster he received mail for some of the parties whose claims he had built cabins on. Thereupon the District Attorney asked the witness what he did with that mail, and over the objection of the defendants' counsel that it was irrelevant and immaterial, the witness testified that the mail of John L. Wells, George Rilea, Richard Depue, Oliver I. Conner, Benjamin S. Hunter, Franklin Hummel, Edward C. Brigham and Nelson B. Smith was received at that postoffice. The District Attorney then asked, "Do you remember what you did with it?" stating that he proposed to show what was done with the mail addressed to those people and that it was forwarded to Jones' office and that all the mail that went from the Oregon City Land Office addressed to homesteaders was forwarded to Jones' office. The witness answered, "I do not remember now, but it was forwarded, I guess, if it was registered mail it was forwarded back either to Jones or the other party. It is so long now I do not remember. It would show on the book, though." Witness further testified that he did not have the book. That Bert Blauvelt, Daniel W. Clark, George F. Merrill,

Granville C. Lawrence, James Lanphere, Herman K. Finch and Addison Longenecker all got their mail there. That he could not remember what was done with each mail separately, **but that some of it was sent back to Mr. Jones.**

In what manner or under what theory could this testimony be admitted without showing in some manner that Mr. Jones had authorized or directed this mail to be sent to him? There is not a hint in the testimony that such was the case, the only evidence on the subject being that of this witness, who testifies that he has no recollection of Mr. Jones ever mentioning the matter, and yet the Government is permitted to prove that this Postmaster forwarded the mail of these homesteaders to the defendant Jones. The evident purpose and intention was to create an inference against the defendant Jones. That is to say, to authorize the jury to infer, first, that these homestead claimants were not bona fide residents on their claims. And second, that Mr. Jones knew they were not such and had arranged in some way to have their mail forwarded to him. Surely it is not necessary for us to make an argument upon the question of the admissibility of this testimony. It was the merest hearsay as to the defendants.

A Presumtion Cannot Be Based Upon a Presumption.

The only possible theory of which we can conceive to make it admissible would be this: That since these letters were forwarded to Mr. Jones, a presumption would arise that he received them. Having received letters addressed to these home-

steaders at Roots, and their being forwarded to him, he would be presumed to know that the homesteaders did not live upon their homesteads. But this cannot make them admissible, because it is basing a presumption upon a presumption. That they were forwarded to Mr. Jones may be taken as a fact, but that only creates a presumption that he received them. If he received them, at the most it could only create a presumption in his mind that the homesteaders were not living on their homesteads and therefore did not receive their mail. We do not believe that this would be the inference to be drawn. We think the inference would be that Roots was their home and their postoffice and for some reason they were temporarily absent. But giving it the strongest presumption possible against the defendants and still it is nothing more than a presumption based upon a presumption. That cannot be done. **A presumption must be based upon a fact.**

A presumption of fact is a logical argument from a fact to a fact. Or it is an argument which infers a fact otherwise doubtful from a fact which is proven. Hence, **a presumption of fact, to be valid, must rest on a fact in proof.**

Wharton's Criminal Evidence, Sec. 707.

No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove facts, the circumstances must be proved and not themselves presumed.

Wharton's Criminal Evidence, Sec. 707, Note 2.

A presumption which the jury is to make is not

a circumstance in proof, and it is not therefore a legitimate foundation for a presumption. It, the presumption, must rest on established facts.

Douglas v. Mitchell's Executors, 35 Pa. St. 440.

King v. Burdette, 4 Barnwell & Ald. 160.

One fact cannot be presumed from another which is itself but an inference.

McAleer v. McMurray, 58 Pa. St. 126.

State v. Lee, 17 Ore. 488.

People v. Kennedy, 32 N. Y. 145.

Copeland v. State, 7 Hump. 484.

Can Evidence of an Attempt by Defendants to Locate Persons on Other Lands in a Lawful Manner Be Introduced for the Purpose of Raising a Presumption Against Them?

The witness Wells was asked the following question by the District Attorney: "And did you in 1900 have any talk with Potter or Jones in relation to securing soldiers' widows to file upon lands?" And the witness answered, "Yes." Thereupon the United States Attorney asked the following question: "Now, you may state what the conversation was and where it took place."

Counsel for the defendants objected to the question because it was incompetent, irrelevant and immaterial, and that the answer could not support any allegation in the indictment and that the time referred to in the question was more than three years before the finding of the indictment and is not competent to prove the charge alleged in the indictment.

The Court allowed the question to be asked and the witness testified that he had a conversation with the defendant Potter, who asked him to call upon Jones, and that he called upon Jones and Jones asked him in substance to procure the widows of soldiers who had never availed themselves of the right of homestead entry to file upon lands, and then proceeded to relate an arrangement by which he procured the widows of soldiers to file upon some land. What lands does not appear. This evidence was offered and admitted for the purpose of showing system and knowledge.

Under the decision of this Court in the Biggs case, this would probably be admissible if it had any tendency to show system or design, but since it does not appear where the widows were to file upon lands or what land they were to get, we are unable to see how it shows system, design or knowledge. The widows of soldiers who had not availed themselves of their homestead rights had a right to file upon lands. As the law stood at that time, they could file upon a homestead and make final proof without ever going upon the lands.

Lamb v. Ellery, 10 Land Decisions 528.

Ex parte Ella I. Dickey, 22 Land Decisions 351.

These decisions were subsequently overruled by Secretary Hitchcock in the Anna Bowes case, 32 Land Decisions 331, but certainly that can make no difference with the question under discussion. So far as appears from the testimony, the soldiers' widows were to comply with the law in every respect in the procurement of their lands. Does that

raise any presumption of guilt on the part of the defendants? If the lands were legally acquired the Government would not have been defrauded. Does proof of an attempt to acquire lands in a perfectly legal and proper manner raise the presumption that parties were intending or subsequently intended to acquire other lands by defrauding the Government and by failing to comply with the law? The learned District Attorney and the equally learned Judge who tried the case were able to see a presumption of that kind, but we confess it is utterly beyond our comprehension. How can the fact that persons attempt to get some land legallly and properly raise any presumption or inference that long subsequent to that time they undertook to get other lands from an improper motive? It seems to us that if there is any presumption it would be the other way. The fact that they went about procuring the land lawfully in the first place would tend to raise a presumption that if they undertook to acquire other lands they would do that lawfully.

A similar question was before Judge Carland recently in the case of United States v. John I. Newell, et al., in the District Court of the Southern Division of the District of South Dakota. The defendants were indicted for conspiracy to defraud the Government by procuring soldiers' widows to file upon lands and then lease them to the defendants. It was shown that the widows never lived upon the lands at all. At the conclusion of the evidence for the Government, the defendants moved the Court to advise the jury to acquit the defendants. The Court said:

"The indictment in this case does not charge the

defendants with entering into a conspiracy for the purpose of committing a crime against the United States. It does charge the defendants with entering into a conspiracy for the purpose of defrauding the United States and the indictment charges that these defendants entered into a conspiracy to defraud the United States by means of false, feigned, fraudulent, untrue, illegal and fictitious entries of said lands under the homestead laws of the United States."

The Court then recapitulated the testimony, and said:

"It is shown by the authorities cited by counsel for defendants that at the time the transactions were had which are alleged in the indictment, it was the law as laid down by the Secretary of the Interior that soldiers' widows were not required to live upon land filed upon by them and that where the land filed on was chiefly valuable for grazing that a lease of the land was not unlawful. The evidence shows that the land in question was valuable only for grazing. In December, 1903, the law or ruling of the General Land Office was changed so as to require residence of soldiers' widows on lands filed on by them, but that was after the commission of the acts complained of."

The jury were accordingly directed to acquit.

(This opinion was filed October 23, 1906, by his Honor, Judge Carland, but we have not been able to find it in the published decisions. I secured a certified copy of it from the Clerk of the Court.)

Can the Application Papers of an Entryman Be Introduced Under an Allegation of an Attempt to Defraud by Means of "False Proofs"?

The Government, after proper proof of identification, offered in evidence the homestead application papers of James Lampheir, which are Government's Exhibits 112, 113, 114, 115, 116 and 117. (See pages 456 to 459 of the record.) The defendants objected to them on the ground that they were incompetent, irrelevant and immaterial and particularly for the reason that they were papers of application for a homestead and not proofs of settlement, which is the means of the conspiracy set out in the indictment. The objection was overruled and an exception allowed.

If this indictment is sufficient to charge the defendants with anything, it is a charge that they conspired to defraud the Government by false proofs of residence and cultivation. An application is not proof. It never can be proof. Proofs of residence and cultivation are, of course, the final proof papers, and certainly if the defendants were notified of anything, they were notified that the proofs were the means relied upon and therefore the application papers have no relevancy or materiality in this case.

Are the Acts of the Government Officials Not in the Presence of the Defendants Admissible for the Purpose?

Government's Exhibit No. 63.

George F. Merrill, being a witness for the Government, was shown a paper and identified his signature on it, and it was then offered in evidence. The

witness testified that he had received it from the Land Office and that he got it through the mail. The defendants objected to its admission as incompetent, irrelevant and immaterial, but it was admitted and exception allowed, and marked Government's Exhibit No. 63. It is as follows: (See Record Page 370.)

"Govts. Ex. 63.

(Original)—4-271a.

DEPARTMENT OF THE INTERIOR,
United States Land Office,
Oregon City, Oregon, April 13th, 1904.

George F. Merrill,
Roots, Oregon.

Sir:

You are hereby notified that the Commissioner of the General Land Office by letter dated March 26th, 1904, has suspended your Final Homestead No. 6567 for the NE ¼ of SW ¼, N ½ SE ¼ Sec. 32 and NW ¼ of SW ¼ Section 33, Tp. 8 S. range 10 West, Oregon City Land District, on charges contained in a report by a special agent.

The charges of which said F. Hd. 6567 is suspended are summarized as follows:

On March 11, 1904, Special Agent A. J. Hobbs transmitted a report accomanied with affidavits of entryman and his two proof witnesses acknowledging false swearing by each in the testimony given at time of proof, and alleging that entry was made at instance of and for the benefit of one W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by the said Jones.

You will be allowed thirty days within which to file application in this office for a hearing, and your failure to apply for a hearing within the time specified will be taken as an admission of the truth of the charges against said Final Hd. 6567, and the same will be cancelled.

Very respectfully,

ALGERNON S. DRESSER, Register.
GEO. W. BIBEE, Receiver.

Com. No. 7649.

(Endorsed) I hereby acknowledge service of the within notice, a copy of the same having been delivered to me by Special Agent A. J. Hobbs, in Portland, Oregon, on date of April 13th, 1904, at 3 o'clock, p. m.

GEORGE F. MERRILL.

The within notice having been served in person, I hereby return the same to the R. & R., U. S. Land Office, Oregon City, Ore., this April 14th, 1904.

A. J. HOBBS,
Special Agent, G. L. O."

Under what theory this was admissible we are at a loss to conceive. The only effect that it would have would be to show the jury that the Government regarded the claim of Merrill as fraudulent and thereby raise the inference that it was fradulent. **Certainly the fact that some officer of the Land Office had suspended the hearing of this claim could not make his acts or declarations evidence against the defendants.**

Can the Final Proof Papers of a Witness Be Introduced for the Purpose of Showing That the Defendants Procured Him to Make False Proofs, When the Witness Denies Making the Answers Therein Contained and There Is No Other Evidence on the Subject?

The Government called as a witness Addison Longenecker, who testified (see page 927) in substance as follows: Being interrogated about his final proof papers, denied that he answered the questions as they appear upon the proof, which is Government's Exhibit 40. He denies that he answered question 5 in the affirmative. He denied that he answered question 6 to the effect that he had been absent for about five months at the time for the purpose of making a living. He denied that he answered question 7 to the effect that he had cultivated one acre and a half for two seasons. The making of this proof is set out as one of the overt acts in the indictment. It is alleged that the defendants caused, induced and procured Daniel Clark to make certain answers exactly as they are set out in Government's Exhibit No. 40, and certain questions in particular are set out which it is alleged the defendants caused the witness to answer in a certain way. The Government then calls this witness and the witness utterly denies making the answers, and upon that state of the record, the exhibit is offered and admitted in evidence, over the objection of the defendants that it was irrelevant and immaterial and in direct contravention of the allegations of the indictment.

It seems to us that this was certainly error. If the witness had testified that he did make the an-

swers, this, taken together with other evidence in the case, would certainly have made the paper admissible, but since he testifies that he did not make them, it would seem that something more would be necessary to make them admissible. To hold otherwise would be equivalent to holding that the paper was admissible in any event, whether the witness answered the questions or not. If the witness did in fact answer them, the Government could have established that fact by other witnesses, but it made no attempt to do so.

Are the Secret Intentions of an Entryman, Not Communicated to the Defendants, Admissible Against Them for the Purpose of Showing Bad Faith?

Louis Paquet was called as a witness and asked by the Government (page 984), "Did you ever at any time intend to make that your home out there in that little cabin?" The defendants objected that it was incompetent, irrelevant and immaterial, as the intention of the witness would not bind the defendants. The Court overruled the objection and allowed the witness to answer. He answered, "Well, now, I calculated to get what I could out of it and make what I could out of it. I calculated that I had a right to this land and if I could get it and sell it it would be my own."

The Court will remember that this witness filed upon his homestead on the 3rd day of October, 1900, and the indictment alleges that this conspiracy was entered into about two years later.

Under what possible theory could the intention

of the applicant bind the defendants? If the indictment charged that a conspiracy was entered into between the entryman and the defendants by which the entryman was not to live upon the lands in good faith, then this testimony might be admissible, but the defendants are not connected with the entryman. There is no allegation of conspiracy on the part of the entryman and under those circumstances it is difficult to see how the defendants can be made criminals by the secret intention of the entryman. The witness was not asked whether he had communicated that intention to the defendants, and there is no allegation or proof that he had done so. And there is no allegation in the indictment that the entrymen had not filed in good faith.

The Government called one Anthony Gannon as a witness (see page 1000), who testified that he entered into a written contract with the defendant Jones. That he went upon his claim in 1900 and proved up on the same in 1901 at Oregon City, and afterwards sold the land to Mr. Montague. And thereupon the District Attorney asked the witness the following question: "You never at any time intended to make that your home up there, did you?" To which the defendants' counsel objected that it was incompetent, irrelevant and immaterial and because the intention of the entryman was not evidence against the defendants. The Court overruled the objection and allowed an exception and the witness answered, "No, sir, I did not."

It will be observed that the defendants are on trial for a conspiracy entered into on September 3, 1902. This witness had made his final proof in 1901. The indictment charges that the defendants

conspired to defraud the Government of certain lands therein described and not including the land of this witness, by false, illegal and fraudulent proofs of homestead entry and of settlement and improvements upon said land respectively by said entrymen respectively, and by causing and procuring said respective entrymen to make false and fraudulent proofs of settlement and improvements upon said lands respectively. The false proofs contemplated by the conspiracy mentioned in this indictment were yet to be made. How can the falsity of the proof upon a claim already made throw any light upon the transactions mentioned or referred to in the indictment? Furthermore, the indictment does not allege that the proof was false or was to be false with respect to the intent of the homesteader. The Government was to be defrauded by means of false proofs of homestead entry, settlements and improvements. How, then, can the secret intention of the homesteader, which is not shown to be communicated to the defendants in any way, have any bearing upon the guilt of the defendants?

The contract entered into between Mr. Jones and the homesteaders (see page 867) provides as follows: "And the party of the first part (the homesteader) agrees to comply with the laws of the United States in regard to residence upon said lands taken as a homestead."

Can these defendants be convicted because the homesteader did not intend to comply with law, although he had agreed with the defendants that he would do so, and his secret intention had not been communicated to them? In what way or

manner does his intention bear upon the guilt or innocence of the defendants?

Is a Chain Stronger Than Its Weakest Link?

The Government called as a witness one John L. Wells, who testified as to certain conversations had with the defendant Jones about getting soldiers to take up land in the Siletz Reservation, and the United States Attorney claimed that Wells was by virtue of these conversations the agent of the defendants Jones and Potter, and thereafter introduced evidence as to the statements of said Wells and other entrymen upon the theory that said Wells was the agent of the defendants. For instance, on page 919, Addison Longenecker was called as a witness and testified as to conversations he had with Mr. Wells; that Mr. Wells told him about the land down there at Siletz; that he went to Mr. Wells' office and made a contract to go on the land; that Mr. Wells was at his house and told him what time to go. Several other witnesses, not necessary to point out specifically, we think, also gave testimony as to conversations with Wells, some of them testifying that they had never talked with Mr. Jones or Mr. Potter about it at all.

With this in view, the defendants' counsel asked the following instruction (see page 1040):

"There has been admitted on behalf of the Government evidence of certain acts or declarations purporting to have been made and done by John L. Wells, relating to proofs of residence and cultivation on the several claims described in the indictment and in the evidence. You cannot consider the said acts and declarations of Wells against the de-

fendant Jones unless you first find beyond a reasonable doubt that they were authorized by the defendants or one or more of them, or unless you find beyond a reasonable doubt that the said acts and declarations were known to the defendants or to one or more of them."

This was refused and an exception allowed.

We submit that this was error. It is elementary that a jury must be satisfied beyond a reasonable doubt of every fact necessary to a conviction. Now, if they were not so satisfied that Wells was authorized to represent the defendants or that defendants knew of the acts and declarations of Wells, by what right does the jury consider them in determining the guilt or innocence of the defendants?

This is a criminal case, in which it is sought to convict the defendants chiefly upon circumstantial evidence. The Court instructed the jury that direct or positive evidence was not necessary. The Court said (page 1057):

"Positive evidence entirely in proof of the conspiracy is not necessary to be had. From the nature of the case the evidence frequently is in part circumstantial," etc.

We understand the rule to be that in criminal trials, at least, the chain is no stronger than its separate links. If the jury were not satisfied beyond a reasonable doubt that Wells was the agent of the defendants, they ought not to have taken into consideration his acts or declarations in making up their verdict.

In Sumner v. State, 5 Blackford, 579, the instruction asked was as follows:

"Every circumstance material in this case must also be proved beyond a rational doubt or it is the duty of the jury to discard such circumstance in making up their verdict."

The Court held that the instruction ought to have been given, and quoted from 1 Starkey on Evidence, 571, as follows:

"Mr. Starkey says that it appears to be essential to circumstantial proof that the circumstances from which the conclusion is drawn should be fully established. If the basis be unsound, the superstructure cannot be secure. The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance."

This is the rule in California:

People v. Phipps, 39 Cal. 326.

People v. Smith, 106 Cal. 73.

In Colorado:

Clare v. People, 9 Colo. 122.

Graves v. People, 18 Colo. 170.

In Indiana:

Sumner v. State, above cited.

Raines v. State, 152 Ind. 69.

In Massachusetts:

Com. v. Webster, 5 Cush. 318.

In Michigan:

People v. Aiken, 66 Mich. 460.

People v. Foley, 64 Mich. 148.

People v. Fairchild, 48 Mich. 31.

In Montana:

Ter. v. McAndrews, 3 Mont. 158.

In Oklahoma:

Dossett v. United States, 3 Okla. 593.

In Texas:

Johnson v. State, 18 Tex. App. 385.

In North Carolina:

State v. Meissimer, 75 N. C. 385.

In North Dakota:

State v. Young, 9 N. D. 165.

In Nebraska:

Marion v. State, 16 Neb. 349.

In Washington:

Leonard v. Territory, 2 Wash. Ter. 381.

In Kansas:

State v. Furney, 41 Kan. 115.

In Illinois the rule seems to be the other way:

Bresler v. People, 117 Ill. 422.

In Iowa the rule was formerly the same as in Illinois:

State v. Hayden, 45 Ia. 11.

But it seems now to agree with the rule in other States:

State v. Cohen, 108 Ia. 208.

In order that the Court may see that this was important, we desire to call the Court's attention to the testimony, from which it appears that the greater portion of the evidence of the conspiracy was made up from the acts and declarations of the witness Wells.

On page 956 William Tightmeier was called as a witness and testified that he had known John L. Wells sixteen or seventeen years; talked with Wells about taking up a claim; that Wells told him that he need not go on the land at all; that the answers contained in the written final proof were what Wells told him to say. That Wells told him to answer he had cultivated an acre or more and raised crops on it two seasons. That he was a witness for Wells making his final proof, but he had never seen Wells on the land and only knew what Wells told him. That he was a witness for George Rilea but knew nothing about the facts and got his information from Wells and from West. That Wells told him they would not have to go on the land but once in six months, and that all the work had been done.

On page 982 Louis Pacquet testified that Wells first spoke to him about filing and told him when to go and file.

George J. West, on page 989, testified that he gave his postoffice address as Siletz, because Wells told him to; that Wells told him they were not very particular up there (meaning the Land Office) and it was merely a form they had to go through.

There was no single witness that pretends to say that the defendants ever advised him not to comply

with the law, or that he did not have to reside upon it in good faith, or that he should state anything except the truth, but all of this class of testimony purports to come from Wells. It was important, therefore, to the defendants that the jury should have been properly instructed upon this subject.

Is An Allegation That the Defendants Knew a Thing To Be True a Sufficient Allegation That the Thing Is True?

The Court gave to the jury the following instruction (page 1070):

"So the essential questions which you are called upon to determine are—Does the evidence show, beyond a reasonable doubt, that Jones, Potter and Wade, or two of them, knowingly and intentionally, on or after September 3, 1902, and prior to May 5, 1904, entered into an agreement or combination to defraud the United States out of the possession, use and title to the lands described in the indictment, or some of them and which were open to homestead entry, by means of false, illegal and fraudulent proof of homestead entry and settlement and improvements upon the lands described in the indictment, as filed upon respectively by the entrymen named to make false and fraudulent proofs of settlement and improvements upon the lands described, and thereby to induce the Government to convey by patent the lands filed upon by the respective entrymen, without any valid or sufficient consideration therefor, the defendants well knowing at the time that each of the respective entrymen named in the indictment was not entitled thereto, under the laws of the United States, by reason of

the fact that they and each of them had failed and neglected to actually settle or reside upon the land for any period or periods of time, and to faithfully and honestly endeavor to comply with the requirements of the homestead law, as to settlement and residence upon or cultivation of the land. And does the evidence satisfy you, beyond a reasonable doubt, that these defendants, or any two of them, then and there well knew that each of the said respective entrymen was entering the land filed upon by him for the purpose of speculation, and not in good faith to obtain a home for himself?"

The defendants excepted to that portion of the instruction which follows:

"Does the evidence satisfy you beyond a reasonable doubt that these defendants, or any two of them, then and there well knew that each of the said respective entrymen was entering the land filed upon by him for the purpose of speculation, and not in good faith?"

Stating the ground of the objection to be that the allegation in the indictment that the defendants knew a thing to be true, is not a sufficient allegation that it is true. There is no allegation in the indictment that the entrymen had failed or neglected to settle upon the lands or to reside upon them, but only an allegation that the defendants knew that they had not so settled and resided upon said lands and that the defendants knew that the entrymen had not taken said lands in good faith for the purpose of a home, etc.

Before the defendants could be guilty, the fact must have existed and the defendants known of it. That this allegation is insufficient is settled by the

following authorities, referred to in the discussion of the indictment:

United States v. Peuschel, 116 Fed. 642.
Bartlett v. United States, 106 Fed. 884.
United States v. Smith, 45 Fed. 561.
United States v. Harris, 68 Fed. 347.
United States v. Long, 68 Fed. 348.

The Time at Which It Was Necessary to Prove the Existence of the Conspiracy.

The indictment in this case was found on September 2, 1905. The final proofs were made on September 5, 1902. As the final proofs were the means set out in the indictment and the causing of certain of these final proofs to be made were assigned as the overt acts, the defendants requested the following instruction (page 1048):

"You cannot find the defendants guilty of any conspiracy that was not in existence and operation between the defendants on or after the 2nd day of September, 1902. That is to say, there must be evidence in this case satisfying your minds beyond a reasonable doubt of some concert of action or understanding to defraud the United States between the defendants between the 2nd day of September, 1902, and the 5th day of September, 1902."

The Court refused to give this instruction and the defendants were allowed an exception, but gave instead the following (page 1070):

"So the essential questions which you are called upon to determine are: Does the evidence show beyond a reasonable doubt that Jones, Potter and Wade, or two of them, knowingly and intentionally, on or after September 3, 1902, and prior to May 5,

1904, entered into an agreement or combination to defraud the United States out of the possession, use and title," etc.

The difference is this: The Government claimed and the Court held that if the conspiracy existed at any time between September 3, 1902, and May 5, 1904, the defendants could be convicted, while the defendants contended the time should be limited from September 2, 1902, to September 5, 1902. In order to determine which contention is correct, it will be necessary again to refer to the indictment.

The indictment charges a conspiracy entered into on the 2nd day of September, 1902, and that on the 5th day of September, 1902, "in pursuance of said conspiracy and to effect the object thereof, said defendants did cause, induce, and procure said Daniel Clark to make final proof," and a like charge with reference to the Longenecker proof.

Now, it is well settled that the overt act must be subsequent to the conspiracy.

In United States v. Milner, 36 Fed. 890, Judge Pardee said:

"In neither count is there any averment of time or place of the alleged overt act which would seem to be necessary to identify the act and to show the Court and jury that the same post-dated the conspiracy and was in fact an act under and part of the conspiracy and done to effect its object."

This really needs no argument, because the act could not be in furtherance of the conspiracy unless the conspiracy previously existed. Now, the defendants are charged with a combination to defraud the United States by means of certain false

proofs. These proofs were made, as appears from the indictment and the proofs, on the 5th day of September, 1902. The causing of these proofs to be made is set out in the indictment as overt acts. Therefore the indictment must necessarily refer to a conspiracy which existed previous to that time. But under the instruction of the Court, the jury were authorized to find the defendants guilty if there never was any conspiracy until the 4th of May, 1904. Under that instruction, if the jury were of the opinion that the defendants had never entered into a conspiracy until May 4, 1904, and they had then entered into it and the Fulton letter was written on the 5th, that they might be convicted, a result which is so plainly and so clearly and so utterly opposed to the whole theory of the indictment and the trial as to warrant the reversal of the case.

If it be said that the jury were authorized to find that there was a conspiracy prior to September 5, 1902, and another one subsequent to that and prior to May 5, 1904, then we ask of which one were the defendants convicted? If they shall again be indicted for a conspiracy to defraud the Government out of this land formed, say on May 1, 1904, can they plead this conviction as a bar? The question cannot be logically answered if the theory of the prosecution is correct.

Ought the Court to Instruct the Jury that They Are Not To Be Influenced by the Fact that the Defendants Have Been Indicted?

The defendants requested the Court to give the jury the following instruction (see page 1042):

"Under the laws of criminal procedure of the United States, persons charged with crime are generally put upon their trials through indictments duly found and presented by the Grand Jury. An indictment is a formal accusation made by the Grand Jury charging a person with the commission of a public offence, but you are all of you doubtless wholly familiar with the rule of law that a defendant is not to be prejudiced by the mere fact that when the question of his guilt or innocence is tried, a trial jury must not be influenced by the fact that he has been indicted."

The Court refused to give this instruction and defendants duly excepted to the refusal.

The Court did not cover this by any other instruction, in fact did not refer to the subject at all. It seems to us that this was clearly error. It needs no citation of authority to convince this Court that a jury ought not to be influenced by the fact of the indictment.

Mr. Wigmore on Evidence, Sec. 2511, Vol. 4, discussing the presumption of innocence and showing that ordinarily it is a part of the rule as to burden of proof, adds:

"But in a criminal case the term itself conveys a special and perhaps useful hint over and above the other term of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusions solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evi-

dence to convince the jury of the accused's guilt, while the presumption of innocence too requires this, but conveys to the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider in the material for their belief nothing but the evidence, i. e., no surmises based on the present situation of the accused, a caution particularly needed in criminal cases."

The Anarchists' Case has been almost a standard for the trial of conspiracy cases since its close, and is quoted and referred to by nearly all authorities on the question. The eighth instruction given for the defendants in that case was as follows:

"The jury are further instructed that the indictment in this case is of itself a mere accusation or charge against the defendants and is not of itself any evidence of the defendants' guilt and no juror in this case should permit himself to be to any extent influenced against the defendants because of or on account of the indictment in this case."

Sackett's Instruction to Juries, page 719.

This is the only case in which we ever heard the instruction refused. Most Courts give it without any request.

Respectfully submitted,

S. B. HUSTON and
MARTIN L. PIPES,
Attorneys for Appellants.

No. 1497

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLARD N. JONES and
THADDEUS S. POTTER,
PLAINTIFFS IN ERROR

vs.

THE UNITED STATES
OF AMERICA
DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

Brief of Defendant in Error

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DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

Brief of Defendant in Error

THE HISTORY OF THE CASE.

On the second day of September, 1905, an indictment was duly filed in the Circuit Court of the United States for the District of Oregon, charging the plaintiffs in error,

together with Wade, with violation of Section 5440 of the Revised Statutes as amended by the Act of May 17, 1879.

This indictment naming the plaintiffs in error, together with others, alleges and charges among other things:

I.

THAT THE PLAINTIFFS IN ERROR ON THE THIRD DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

III.

Those certain portions of its public lands situate, lying and being within the State and District of Oregon *which were open to homestead entry under the LAND LAWS of the United States AT THE TIME the respective homestead filings hereinafter mentioned were made thereon* at the local land office of the said United States at Oregon City in said State and District of Oregon.

(Here follows a description of the land, together with the names of the entrymen who made such homestead filings, and the date upon which such filings by such entrymen were made).

Transcript of Record, Pages 14, 15 and 16.

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants, Willard N. Jones and Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESI-

DENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants, Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID LAND SO FILED UPON BY HIM FOR THE PURPOSE OF SPECULATION AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

Transcript of Record, page 18.

VII.

(1) AND THAT IN PURSUANCE OF SAID CONSPIRACY AND TO EFFECT THE OBJECT THEREOF SAID DEFENDANTS, JONES AND POTTER, DID CAUSE AND PROCURE DANIEL CLARK TO MAKE A HOMESTEAD PROOF,

Transcript of Record, pages 19, 20 and 21.

AND A FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS,

Transcript of Record, pages 23 and 24.

AND THAT THE DEFENDANTS AND EACH OF THEM WELL KNEW THAT THE HOMESTEAD PROOF SO SUBSCRIBED BY CLARK AND HIS ANSWER TO QUESTION NUMBER 5 THEREIN WAS FALSE, IN THAT CLARK NEVER RESIDED UPON THE LAND AT ALL.

(2) That Ira Wade on the 5th day of September, 1902, certified to the foregoing testimony of Clark.

Transcript of Record, page 25.

(3) That on the 5th day of September, 1902, the defendants, Jones and Potter, caused, induced and procured Addison Longenecker to make final proof before Wade,

Transcript of Record, pages 25, 26, 27, 28 and 30,

and that said defendants, Jones, Potter and Wade, and each of them well knew at the time such homestead proof was so subscribed by Longenecker that his answer was false to question number 5, and that said Addison Longenecker had never resided upon said land at all.

(4) That on the 5th day of September, 1902, Ira Wade certified to the foregoing testimony of Longenecker.

(5) That Defendant Willard N. Jones on the 5th day of May, 1904, did cause and procure the following letters and affidavits to be sent to the Secretary of the Interior by Charles William Fulton, there and then the duly qualified and acting United States Senator for the State of Oregon, setting out the said letter of Fulton,

Transcript of Record, page 32;

the letter of Jones dated April 23, 1904, referred to in the Fulton letter of May 5, 1904,

Transcript of Record, pages 33 to 39;

the agreement between Jones and the entrymen,

Transcript of Record, pages 39 to 42,

attached to which there will be observed a confirmatory affidavit sworn to by Jones before George Sorenson, under date of the 23d day of April, 1904, in which Jones, a plaintiff in error, makes the following statement of fact:

"THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE FULL AGREEMENT SIGNED BY ADDISON LONGENECKER, DANIEL CLARK

AND GEORGE F. MERRILL, AND THAT THERE WAS NO OTHER VERBAL OR WRITTEN AGREEMENT EXPRESSED OR IMPLIED WHEREBY THEIR HOMESTEAD CLAIMS WOULD INURE IN WHOLE OR IN PART *TO ME,* EXCEPT AS IS STATED IN THE FOREGOING AGREEMENT."

Transcript of Record, page 43.

The indictment then concludes with the usual charge against the peace, dignity, etc., signed by the proper officers AND WITH THE NAMES OF THE WITNESSES ENDORSED THEREON.

On the 2d day of September, 1905, before the Honorable William B. Gilbert, United States Circuit Judge then presiding, the foregoing indictment was duly returned into court by the grand jury who, through its foreman presented the same, which indictment was then and there received by the Court and ordered to be filed.

Transcript of Record, page 45.

Ira Wade pleaded not guilty.

Jones and Potter filed a motion to set the indictment aside on the ground that the names of all of the witnesses examined before the grand jury were not inserted at the foot of the indictment.

Transcript of Record, page 50.

This motion was overruled September 25, 1905.

Transcript of Record, page 53.

Thereupon Jones and Potter united in the filing and submission of a plea in abatement and demurrer, which were submitted without argument. The demurrer is general, while the plea in abatement says, first, that the grand

jury was not legally in session; second, that it was adjourned until the 5th day of September, 1905; third, that it reconvened after its first adjournment and prior to the adjourned date at which it was to meet again without any order of Court, and there voted upon the indictment in question; and, fourth, that certain members of the grand jury were not present and were not notified and had no knowledge of the finding of the indictment. But it will be observed that this plea does not state that any member of the grand jury, if present, would not have voted for said indictment, or that he would have voted differently, or that it would have altered the result. In fact it is admitted in the brief of the counsel for the plaintiffs in error that the absent grand jurors would have voted for the indictment, and again, it is apparent from the plea in abatement that it is made upon legal grounds having to do with the technicality largely based upon said practice as to the convention and adjournment of the grand jury without regard to any question of fact being asserted or stated from which it might be adjudged that the defendants were in any wise prejudiced.

That this is apparent results from an examination of the agreed statement of facts (Transcript of Record, page 63) which was filed on the 28th day of October, 1905. This agreed statement of facts considered in connection with the plea in abatement demonstrates to a moral certainty the following facts:

That the grand jury which returned the indictment was composed of twenty members and that all of these members except one were present during the taking of the testimony which resulted in the finding of the indictment, and

that all of the members of the grand jury were present at the session at which said indictment was voted upon and that all the members then so present voted in favor of said indictment against Willard N. Jones.

It further appears that if the grand jury did anything they took a recess which, as a deliberative body, there can be no question at all of their right to do.

Transcript of Record, page 64.

That messages were then sent out convening them again shortening the recess, that of the twenty jurors who composed the grand jury, eighteen members who heard the testimony and who were present, voted in favor of the indictment against all the defendants.

It was also stipulated that there was no order of Court re-convening the grand jury on September 2, 1905, and that the plea in abatement might be decided and determined upon this agreed statement of facts.

Being so heard, the plea in abatement was overruled.

Transcript of Record, page 68.

Thereafter came on to be heard the demurrer, and it was likewise overruled.

Transcript of Record, page 71.

On October 3, 1905, the cause came on for trial (Transcript of Record, page 71), the trial continued for twelve or fifteen days, whereupon the jury returned a verdict finding the defendants, Jones and Potter, guilty as charged in the indictment.

Transcript of Record, page 86.

Motions for a new trial and arrest of judgment were duly filed and overruled.

On the 4th day of August, 1906, the defendant Jones was sentenced by the Court to pay a fine of two thousand ($2,000.00) dollars and be imprisoned for a term of one year at McNeil's Island, the defendant Potter was sentenced to pay a fine of five hundred ($500.00) dollars and be imprisoned for a term of six months in the county jail of Multnomah County.

Transcript of Record, page 93.

Supersedeas was granted as to both defendants.

Transcript of Record, pages 94 to 99.

On the 15th day of October, 1906, a writ of error was sued out and the case thereafter came to this Court upon the assignments of error.

Transcript of Record, pages 108 to 280, Nos. I to CLXIII.

And the writ of error issued February 2, 1907.

Transcript of Record, page 836.

The laws of the United States which made it possible for the transactions and things inveighed against by the indictment in this case are to be found in the Acts of Congress, August 15, 1894, 28 Statutes, 323 and 326; of May 17, 1900, 31 Statutes, 179; and of January 26, 1901, 31 Statutes, page 740.

Counsel for plaintiffs in error have apparently overlooked the course of this legislation, for they ground most of their complaints on the theory that the only Act of Congress in question in this matter is that of August 15, 1894.

It is a significant and very important fact that while tracing the course of this legislation it is seen that the very class of entrymen comprehended in the evidence in this case and who are named in the indictment, is the only class of individuals who could profitably and expediently avail themselves to the benefit of the conspirators in the acquisition of the lands comprehended by such legislation.

The Siletz Indian Reservation lands originally were open to entry in accordance with the provisions of the homestead laws by the payment on the part of the settler who should become an actual settler, of the sum of fifty cents per acre, together with the additional sum at the time of final proof of one dollar per acre, his final proof to be made within five years from the date of his entry and three years' actual residence required as prerequisite to title or patent.

The Act of August 15, 1894, provided in these particulars as follows:

"The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws, shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

These Siletz lands, because of the monetary consideration required, did not seem to be popular with those engaged in the business of acquiring land.

So we must look to the further legislation on the subject to find what was done in the matter. We refer to the Act of May 17, 1900, 31 Statutes, page 179, the relevant portion of which is contained in the following:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: *Provided,* That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect."

It will be observed that the dollar and a half per acre charged was wiped out and that the right to commute any such entry in the time and at the prices then fixed by existing law should, in respect of said lands, be in full force and effect. So, all the prospective settler had to do was to initiate his homestead entry, pay the fees of the land office,

reside for the period of three years and become entitled to his patent.

Congress, however, to remove all apparent doubt upon the subject, legislated more positively in this regard by the Act of January 26, 1901, 31 Statutes, page 740:

"CHAP. 180. An Act to allow the commutation of homestead entries in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of Section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries be, and the same hereby are, extended to all homestead settlers affected by or entitled to the provisions of the Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' approved the seventeenth day of May, Anno Domini nineteen hundred: *Provided, however,* That in commuting such entries the entryman shall pay the price provided in the law under which the original entry was made.

"Approved, January 26, 1901."

In this state of the law several rulings were made by the General Land Office, some of which are referred to in the brief of the plaintiffs in error, but as we have not at hand a printed copy of such brief, we cannot cite the Court to the pages in question, but can say generally that the rulings of the land office referred to by the plaintiffs in error

are in cases designated by the names of the entrymen as follows:

Ex Parte Clara M. Allison, October 12, 1902.

Ex Parte Elizabeth Caplinger, February 3, 1902.

Ex Parte Ella I. Dickey.

Lamb v. Ellery.

But a much more important ruling of the General Land Office as bearing upon the design, plan and intention of the conspiracy charged in the indictment is that of Ex Parte Hattie C. Allebach, one of the soldier's widows used in the conspiracy charged in the indictment, given July 2, 1902 by W. A. Richards, Assistant Commissioner, as follows:

"Hattie C. Allebach.	Decision of January 28, 1902, recalled and modified on motion for review. Allowed thirty days to show cause why entry should not be cancelled.

"Register and Receiver,

Oregon City, Oregon.

"Gentlemen:

"August 17, 1900, Hattie C. Allebach, widow of Knox P. Allebach, deceased, made H. E. No. 12949, F. C. No. 6415, September 3, 1901, under Section 2307 U. S. R. S., for S. E. 1-4 Sec. 24, T. 9 S., R. 11 W.

"From the proof it appears that Mrs. Allebach never resided or made any personal act of settlement on the claim, but had about 1 1-2 acres cultivated for one season.

"The records of the War Department show that Knox P. Allebach served in the army during the Civil War and

was entitled to credit for three years (having been discharged on a surgeon's certificate of disability), which service, together with the time between date of entry and final proof, aggregate four years and seventeen days.

"By letter C of January 28, 1902, you were directed as follows:

"You will require entrywoman to appear before your office with any corroborating witnesses she may have, and testify orally as to whether she has performed any personal act of settlement upon the land, and if so, to state the facts in reference thereto in full. You will notify the special agent operating in your district, of the time and place for the taking of such testimony, and cross-examine such claimant and witnesses and also to ascertain by cross-examination or otherwise, whether or not the entry was made solely for the benefit of the entrywoman. The testimony and cross-examination must be reduced to writing by you and signed by the claimant and witnesses and transmitted with your report and recommendation in the matter.

"I am now in receipt of your letter of May 15, 1902, transmitting evidence of service of notice of my decision of January 28, 1902, upon the entrywoman, together with a motion for a review of the same, filed by F. P. Mays and Thad S. Potter, attorneys for applicant, April 10, 1902.

"The motion for review has been supported by argument of able counsel. It is contended that the case of Ella I. Dickey (22 L. D., 351), held that an entry made when the general circular of March 1, 1884, was in force, authorized the widow of a deceased soldier to complete a home-

stead entry made by her upon proof of cultivation in good faith without residence upon the land.

"The provisions of the said circular of 1884 are as follows:

" 'The ruling relative to the widow or minor children of a deceased homestead party as to actual residence (page 15), is equally applicable to the widow or minor children of a deceased soldier or sailor; if the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not reside upon the land.

" 'Counsel called attention to the words of the general circular of July 11, 1899, upon the subject, page 24, paragraph three, which are as follows:

" 'The ruling hereinbefore stated relative to the widow or minor children of another deceased homestead party as to actual residence is equally applicable to the widow or minor children of a deceased sailor or soldier; if the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not actually reside upon the land.'

"It is contended that the similarity of the wording of the two circulars authorizes the widow of a deceased soldier now, as well as formerly, to complete her entry upon proof of cultivation in good faith alone.

"It appears, however, that in the decision in the case of Ella I. Dickey, supra, the Department found that: 'At the time this entry was made in 1887, the only expression of the Department as to the construction to be placed upon Section 2307 was that contained in the general circular of March 1, 1884, the circular then in force.'

"After quoting the requirements of the circular as to cultivation, showing substantial compliance with the law, the Department in said decision further held:

"This is the information that the Department has given to the public through the medium of its general circulars, and with the law as thus construed Mrs. Dickey has strictly complied.

"The decision of the Department then recites the holding in the case of Mary R. Leonard (9 L. D., 189), as follows:

" 'A departmental construction of a statute until revoked or overruled, has all the force and effect of law, and acts performed thereunder are entitled to protection.'

"However, the Department in said decision construes Section 2307 of the Revised Statutes under which the widow of a deceased soldier is authorized to enter public land and holds that the word 'settlement' therein means 'personal identification in some manner with the tract claimed.'

"The general circular does not now contain the 'only expression of the Department as to the construction to be placed upon Section 2307.' The departmental construction of said Section is more properly to be found in a formal decision than in a general circular.

"I further find that the lands applied for are within the former Siletz Indian Reservation, the disposition of which is provided for by the Act of August 15, 1894 (28 Stat., 326), which provides:

" 'The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under

the townsite law and under the provisions of the homestead law; Provided, however, That each settler under and in accordance with the provisions of said homestead laws, shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry and three years' actual residence upon the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.'

"Counsel contended that the words 'final proof to be made within five years from the date of entry and three years' actual residence on the land shall be established by such evidence as is now required by homestead proofs, as a prerequisite to title or patent' are not intended to modify the requirements of Section 2307 so as to require three years' actual residence by widow of deceased soldiers, and that the words 'shall be established by such evidence as is now required in homestead proofs' would include the right of the widow to prove compliance with the law by *by* cultivation under the requirements of the general circulars referred to.

"It seems that the general provisions of the homestead laws are modified by the proviso in the Act of August 15, 1894, supra, so as to require actual residence for three years upon the land instead of five years' actual or constructive residence under the general homestead law.

"In passing upon the question as to the right to make a soldier's addition H. E. for restored lands under certain

Acts, where restrictions were made for disposal of lands to actual settlers only, viz:

"Act of March 2, 1889 (25 Stat., 1005), that the 'lands shall be disposed of to actual settlers under the homestead laws only.'

"Act of May 2, 1890 (25 Stat., 81), that 'they shall be disposed of to actual settlers only,' and

"Act of March 3, 1893 (27 Stat., 363), 'they shall be disposed of * * * * * * to actual settlers only' it was held that the right to enter the lands therein referred to is expressly limited to *actual settlers* and that settlement thereon is obligatory and a condition precedent to entry. See letter "N" of October 23, 1900, to R. & R., Lewiston, Idaho, in Quasi Contest case No. 1910.

"In my letter C of February 3, 1902, to your office, in the case of Elizabeth Caplinger, involving H. E. No. 13118, made by William Caplinger on October 6, 1900, for S 1-2 SE 1-4, E 1-2 NE 1-4 SE 1-4, SE 1-4 SW 1-4, and Lot 4, Section 15, T. 9 S., R. 10 W., Siletz Indian Reservation lands, it was held that three years' actual residence is required of homestead settlers on these lands as a prerequisite to title or patent, and that the military service of the deceased entryman could not be accepted in lieu of residence.

"Mrs. Allebach's entry appears to be illegal, and you will notify her that she will be allowed thirty days from service of notice within which to show cause why her proof should not be rejected, and the final certificate cancelled.

"Serve notice and make report in accordance with circular of March 1, 1900 (29 L. D., 649).

"My decision of January 28, 1902, is recalled and modified as above. Very respectfully,

"W. A. RICHARDS,

"E. B. H. Assistant Commissioner."

It is not, therefore, as stated in the brief of the plaintiffs in error, the law, nor was it the law at the time, that soldiers' widows could file upon a homestead and make final proof without ever going upon the lands comprehended in this indictment.

Now let us see what happened as a matter of historical retrospect, demonstrated by the evidence adduced in this case without objection. Eleven soldiers' widows under the facts testified to by Wells (Transcript of Record, pages 848 and 849) on the theory that they were entitled to land without settlement, were selected for the purposes set forth in the indictment.

The fact then before the conspirators was that the Commissioner of the General Land Office had held, in passing upon the application of Elizabeth Caplinger and Hattie Allebach to make final proof upon homesteads in the Siletz Reservation, that military service could not be applied as residence upon such a homestead, but that three years' actual residence was required.

The record discloses that Wells turned his hand to getting soldiers to file, although he does not state which of the defendants, either Jones or Potter, spoke to him about the soldiers, but his recollection was that Mr. Potter spoke first (Transcript of Record, page 850), and that he then went to soldiers and told them about the homestead propo-

sition and that they were to go to Mr. Jones and Potter and enter into a contract, if they wished to do it that way, or they could sign a contract before Wells and he would hand it to either Jones or Potter, and that some of them signed the contract before a witness, but most of them before Mr. Jones and Mr. Potter, and that he informed these persons, who are the same persons mentioned in the indictment, that if they had served two years in the army *they would only have to hold the homestead about twelve or fourteen months before they could prove up, and that Mr. Jones would pay them two hundred dollars for their right.*

Transcript of Record, pages 852 and 853.

So, we find upon reference to the evidence adduced in the cause, that twenty-six entries by old veteran soldiers who were picked up by Wells and the other coadjutors acquainted with the plan, on the theory that they would become entitled to deduct their time of service in the army from the actual time required by the Act of August 15, 1894. But the evidence also discloses that the land office held in these respects that having already reduced the time from five years to three, and given them the right of commutation beside under the Act of 1901, they should be held to the terms of the statute.

Now, what did they do?

See the colloquy between Court and counsel (Transcript of Record, pages 853 and 854), and then the resumption of the testimony by the witness (Transcript of Record, page 855), where he reiterated what it was that Jones and Potter told the witness to tell the soldiers, which evidence

came in without any objection and which was to the effect that what Jones and Potter told Wells to tell the soldiers was *that if they filed upon the lands, that Jones would pay all the expenses and that they were to give a mortgage back to Jones for the expenses and that Jones was to pay them two hundred dollars besides.*

Transcript of Record, pages 855 and 856.

We find in further examination of the record that the testimony discloses that when the entryman went to file on this land Jones went with him (Transcript of Record, page 858), and *that Jones paid the fare* of the persons named to Oregon City and gave them the description of the land, and that some time after when they went down on the land *Mr. Potter notified them the time to go.* They were met at the Southern Pacific West Side depot and there were about twenty of them with Mr. Potter present. *Potter paid their expenses* and when they arrived at Toledo *Potter paid their expenses* at the hotel and they went into the land by teams furnished by Potter; that they were shown their claims and did not remain any time; that they found cabins on the claims and that on the return trip *Mr. Potter paid their expenses* and *their hotel bills* and *accompanied them when they took the train to Portland. When they came back to Portland Mr. Jones was seen and informed* that these entrymen were down there and that most of the boys went to their claim and *that Mr. Jones was told that some of them remained* down there.

Transcript of Record, pages 859, 860 and 861.

It furthermore appears from the testimony introduced without objection, that the next time, within less than six

months, they were *notified to go down to the claims by Mr. Jones* and *that the expenses were to be paid by Mr. Jones* (Transcript of Record. pages 861 and 862) ; and that when they came back from that trip another *report was made to Mr. Jones* and the *expenses of the trip were shown and Mr. Jones was informed of the weather and how difficult it was to get to the claim and that Jones gave him enough money to pay the expenses there and back.*

Transcript of Record, pages 864, 865 and 866.

At the conclusion of this trip the evidence shows that they came back to Portland and that *the trip was reported to Jones and Jones was given an itemized statement of the expenses;* that the last time they went down was in August, 1901.

Transcript of Record, page 870.

An examination of the Transcript of Record, pages 874, 877, 878 and 879, shows from the testimony of one of the entrymen the evidence that *Potter directed what answers were to be given to the questions asked in the proofs, and that Potter interrogated the entrymen concerning the interview he had with Loomis, and that after he returned to Portland he saw Mr. Jones;* that the executed a mortgage and that the arrangement he had between Mr. Jones and himself was that he was to turn the land over to Mr. Jones and get two hundred dollars for it.

The colloquy then ensuing between Court and counsel (Transcript of Record, pages 879 to 884), places a limit upon the exceptions discussed in the brief of the counsel for the plaintiffs in error in respect of the fact that the question before the Court was whether the demand for the

production of the deed to Jones then traced to Jones' possession, was justified by the evidence and it was then adduced that *Mr. Potter was assisting around at the time of making proofs and took a seat at the Clerk's desk* at the time the proof was being offered.

Transcript of Record, page 886.

That Mr. Jones had introduced him to Mr. Potter (Transcript of Record, page 893) ; *that Mr. Jones and Mr. Potter were working together* (Transcript of Record, page 894), and that Mr. Potter informed him that *Judge Galloway was a friend of the old soldiers and that the proof would go through all right* (Transcript of Record, page 895), and *that Mr. Potter suggested to them to take the proof and instruct the others what to say in each of the questions and that some of the entrymen were spoken to about it and an endeavor made to tell them just what Potter had instructed him to say;* that he knew what answer was required *and that Potter had instructed him as to the form of answer to tell the soldiers to make.*

Transcript of Record, page 896.

It is to be observed by reference to the pages of the Transcript last referred to and to the matter following on pages 897 and 899 showing the conscious participation of the defendants, that no objection was made or offered to the testimony.

These facts are the subject of corroboration by other witnesses.

Addison Longenecker, Transcript of Record, pages 919, 920, 921, 924 and 926.

On further occasion this witness testified that when they were at Toledo their names were called off and *Mr. Jones said they were to go down to Portland and that they then came down to Portland and went up to his office and signed a whole lot of papers.*

This testimony is likewise corroborated by an entryman by the name of George F. Merrill.

Transcript of Record, pages 940, 954, 955.

James Landfair (Lamphere, Landphier), another witness, gave like testimony.

Transcript of Record, pages 974, 982.

We then come to the testimony of George J. West, who stated that he filed on a piece of land in the Siletz Reservation and that he talked with Jones and Wells about it, and that he was told, and so were the other soldiers, that they would only have to go up every six months and that it would be a little outing trip every six months, as he had been in the service so long; that he made final proof when Mr. Potter was at Toledo.

Transcript of Record, pages988 and 989.

Jones asked Sisler if he could put some timber land in Sisler's name as a temporary matter, and that Jones told him they were in the Siletz country and that he had afterward put them in his, Sisler's, name.

Transcript of Record, page 993.

These transfers are well illustrated by reference to the Record at pages 995, 997, 998.

In addition, there were settlements *made by Jones* of

certain contests against filings thus initiated by Potter, Wells and Jones.

Transcript of Record, pages 1022, 1025, top of pages 1026, 1027 and 1028.

The defendants called as a witness Charles F. Moore, who was Register of the Land Office at Oregon City, (Transcript of Record, page 1031), and he testified that in all the proofs offered and shown in the case that he, as an officer, had made sure that the witnesses understood everything, and it was shown in evidence that the requirements of the homestead law, among other things, were actual residence in a house upon the land and a cultivation continuously **and that occasional visits within periods of six months or oftener did not constitute residence.**

Transcript of Record, page 1033.

From an examination of each and all of the proofs it appears that the entrymen and their coadjutors and conspirators were well advised of the rulings of the Department.

See the letter of James Landfair, Transcript of Record, page 487, dated November 14, 1904, prior to the time that the indictment was returned, addressed to Landfair in the care of Potter, and see also Transcript of Record, pages 480 and 483.

There are many other instances of like kind. It is also to be observed that there were commutation affidavits filed, a fair sample of which is found in the Record at page 467, in which Landfair states among other things:

"Not wishing to continue his residence upon said claim

for the full three years, he at this time desires to commute his claim under Act of Congress of January 26, 1901."

This affidavit is dated on the 10th day of October, 1902. It is to be observed that this is some thirty days after the period named in the indictment.

See Transcript of Record, page 467, Government's Exhibit No. 123.

It is to be observed that all of the evidence is not in the record. The bill of exceptions does not purport to give all of the evidence, nor is it so certified.

Transcript of Record, page 1086.

It cannot, therefore, be presumed that there was not other evidence equally forceful substantiating the government's case and submitted to the jury. The purpose of the foregoing statement is to point out to the Court the fallacy of the position of the plaintiffs in error, pages 76 and 77 of their brief, where it is stated to the Court on page 77, after citing some of the proofs in question:

"So it appears that not one of these entrymen proved or attempted to prove that he had resided upon the land for the period required by law, and that THERE WAS NO POSSIBILITY OF THE GOVERNMENT BEING DEFRAUDED BY REASON OF THESE PROOFS."

The obvious facts shown by the foregoing history of the case are that each and every entryman availed himself of the provisions of the Act of August 15, 1894, repealed, modified and amended by the Act of May 17, 1900, and again repealed and modified by the Act of January 26,

1901, according and giving the right of commuting the very entries under which the counsel for plaintiffs in error are now attempting to have this Court believe could only be made on a proof of three years' previous residence; but which could be made and were in fact made on the basis of fourteen (14) months' *actual* residence, measured by six months' *constructive* residence by going on the land once over night every six months, after the first six months allotted by law within which to establish a residence. So, we have, therefore, the spectacle of a *"three years' actual residence"* requirement under the law disappearing to revive again in a designed and obviously fraudulent make-shift of one trip in six months without domicile or cultivation. To help the old soldiers? No. **The purpose was to defraud the United States of the possession of its lands.**

POINTS FOR DISCUSSION.

Counsel for plaintiffs in error have kindly furnished one of the counsel for the government with the proof sheets of their brief. It is not paged and necessity therefore arises to refer to the matter discussed by headings rather than by specific references to brief pages. *The brief of the plaintiffs in error does not contain any specification of the errors relied upon and intended to be urged.* There are 163 asignments of error and it is impossible within the limits of a brief or the time at the disposal of counsel to discuss all possible features of the case.

Without limiting, however, any presentation that the Government may have to present, either orally or by brief, reserving the right to apply to the Court at any time to file a supplemental brief herein, we take up seriatim the various subheads which counsel have discussed, as appears from the proof sheets of the brief furnished by them, assuming that counsel for plaintiffs in error, have abandoned all other assignments of error, there being no specifications of errors as pointed out, *under the requirements of Rule 24 of this Circuit.*

We will, therefore, divide this brief as follows:

I.

In criminal cases in the Federal Courts state laws do not control and state decisions have no application.

II.

The motion to quash the indictment was properly overruled. The local state statute and practice does not govern.

III.

The plea in abatement was properly overruled.

IV.

The demurrer to the indictment was properly overruled and the indictment in this case is sufficient to fully and fairly apprise the defendants of the charge they shall be called upon to meet.

V.

The statute of limitations.

VI.

The admission of evidence and rulings thereon and instructions of the Court.

VII.

Argument.

IN CRIMINAL CASES IN THE FEDERAL COURTS STATE LAWS DO NOT CONTROL AND STATE DECISIONS HAVE NO APPLICATION.

The law administered in criminal cases in the Federal Court is entirely federal, the entire jurisdiction is statutory and the state law has no application.

United States v. Reid, 12 How. 363;
Jones v. United States, 137 U. S. 211;
Manchester v. Massachusetts, 139 U. S. 262;
Starr v. United States, 153 U. S. 625;
Allis v. United States, 155 U. S. 124;
Simmons v. United States, 142 U. S. 148.

Furthermore, the statute adopting the state laws as rules of decision does not apply to criminal prosecution in the Federal Courts.

United States v. Reid, 12 How. 363;
Logan v. United States, 144 U. S. 301;
United States v. Hall, 53 Fed. 353;
United States v. Coppersmith, 4 Fed. 205;
United States v. Baugh, 1 Fed. 788;
Lang v. United States, 133 Fed. 204.

Concrete instances might be multiplied illustrating principles within the above cited cases where the Federal Courts have refused to follow the State law:

The law against the offense of larceny cannot be enforced according to the State law.

United States v. Stone, 8 Fed. 239.

Another instance is the enforcement of the law against murder.

United States v. Clark, 46 Fed. 635.

Revised Statutes Section 1021 provide that any indictment may be found or any presentment may be made with the concurrence of at least twelve grand jurors.

In another case the competency of a witness to testify in a murder case was held to depend upon the determination of the Federal tribunal and not upon the State law.

United States v. Hall, 53 Fed. 353.

So, notwithstanding that State Courts require the jury to be kept together, it was held not ground for a new trial in the Federal Courts where that precaution was omitted.

United States v. Davis, 103 Fed. 457.

Under Revised Statutes Section 1025 it is provided that defects in form should be disregarded and that no indictment in any criminal case nor the trial judgment or other proceedings thereon be deemed insufficient or defective by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant—*it is even held* that the fact that the above rule obtains in the State Courts does not affect the above section.

United States v. Malloy, 31 Fed. 19.

THE MOTION TO QUASH THE INDICTMENT WAS PROPERLY OVERRULED. THE LOCAL STATE STATUTE AND PRACTICE DOES NOT GOVERN.

The dicta referred to by counsel for the plaintiffs in error in their brief excerpted from the case of *United States v. Mitchell,* 136 Fed. page 911, applies to the organization of grand juries only, as that was the matter before the Court; and the case is therefore not in point upon the precise question presented by the motion to quash.

The questions presented in the present motion to quash referred to in the brief of plaintiffs in error, have been before this Court several times.

In the case of *Shelp v. United States,* 81 Fed. 694, a case in this Court June 7, 1897, opinion by District Judge Hawley, where under the statutes of Oregon it was contended that the names of witnesses examined before the grand jury must be inserted at the foot of the indictment, Judge Hawley said:

"This statute has no application to this case. There is no statute which requires a list of the witnesses to be furnished to a person indicted for a misdemeanor. If the indictment is not for a capital offense the defendant is not entitled as a matter of right to a list of witnesses or jurors."

Shelp v. United States, 81 Fed. top of page 697.

In *Ball v. United States,* 147 Fed. 32, decided by this Court June 18, 1906, and a rehearing denied October 29, 1906, opinion by Circuit Judge Gilbert, this Court held, where it was assigned as error that the Court overruled the motion of the plaintiff in error to require the District Attorney to furnish the list of all the witnesses produced before the grand jury:

"That statute applies only to the trial of treason and capital cases in Courts of the United States."

In *Thiede v. Utah Territory,* 159 U. S. 510-515 the Court said:

"In the absence of some statutory provision there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial."

The Circuit Court of Appeals for the Eighth Circuit is also in accord with these facts, for in *Balliet v. United States,* 129 Fed. 689, opinion delivered by Circuit Judge Thayer, it is held by that Court that the statutes of the United States authorize the examination of witnesses in trials in the Federal Courts for lesser crimes than treason or capital offenses **without such witnesses being previously disclosed to accused.**

THE PLEA IN ABATEMENT WAS PROPERLY OVERRULED.

The main ground which counsel for plaintiffs in error make on their plea in abatement is that the grand jury was not in legal session at the time the indictment in this case was returned.

In the "History of the Case," given in the previous pages of this brief, attention was called to the fact that there was an agreed statement of facts (Transcript of Record, page 63), in which statement of facts it was stipulated that there was no order of Court re-convening the grand jury on September 2, 1905, when the indictment was returned, and that on the first day of September the grand jury on its own motion took a recess to Tuesday, the 5th day of September, 1905.

It is claimed because of this that the grand jury was not in legal session and that it had no authority to re-convene itself. Counsel for plaintiffs in error have attempted by analogous reasoning to show that the grand jury is to be likened to the board of directors of a corporation. There can be no such comparison from the standpoint of any legal ground. The reason is obvious.

From time immemorial in the Federal Courts, reviewing some of the cases back as far as 1789, the practice was, and has since crystallized into the doctrine, for the expedition of public business, that a Federal grand jury when properly convened meets and adjourns at its own convenience and sits upon its own adjournments, and is **only discharged by the final adjournment of the Court or by the Court's order.** In addition to this many cases

are found in which grand juries have before the final adjournment of the Court been discharged but were again summoned and instructed by the Court to consider matters found in which grand juries have before the final adjournment of the Court been discharged but were again summoned and instructed by the Court to consider matters which had arisen since their discharge but before the adjournment of the term, and their action in this behalf was held valid. The procedure in the State Courts where, if at all, technicalities are most countenanced, has been examined, and it is found that many States having extremely rigid provisions with respect to actions of a grand jury endorse the doctrines above expressed.

In *Nealon v. People,* 39 Ill. App. 481, on the precise question made by counsel for plaintiffs in error, it is there held that a grand jury, without reference to the temporary adjournment of the Court, when properly organized may meet and adjourn upon its own motion and may lawfully proceed in the performance of its duties whether the Court is in session or not until the final adjournment of the term.

Nealon v. People, 39 Ill. App. 481;
In re Gannon, 69 Cal. 541;
State v. Reid, 20 Iowa 413;
Olmer v State, 14 Ind. 52;
Long v. State, 46 Ind. 582;
Commonwealth v. Wood, 76 Mass. (10 Gray) 477,

where, indeed, without examining witnesses anew, the jury found an indictment and substituted for another indictment found by them on investigation of the facts at a previous term.

Furthermore, an indictment is not vitiated by the improper discharge of a juror, provided that the number necessary to find an indictment remain.

Gladden v. State, 12 Fla. 562;
United States v. Belvin, 46 Fed. 381;
Smith v. State, 19 Tex. App. 95;
Watts v. State, 22 Tex. App. 572;
Portis v. State, 23 Miss. 578;
State v. Wilson, 85 Mo. 134;
Commonwealth v. Burton, 4 Leigh (Tenn.) 645.

The Federal statutes, Revised Statutes, Section 1021, provide that for the return of any indictment twelve jurors must concur. The plea in abatement in this case does not negative the fact that twelve jurors did concur.

State v. Copp, 34 Kans. 522;
Watts v. State, 22 Tex. App. 572;
State v. Ostrander, 18 Iowa 435;
People v. Hunter, 54 Cal. 65;
United States v. Standard Oil Company, 154 Fed. 728, 734,

all of which cases hold that, although some juror may have been absent or excused, yet where twelve concur the indictment is valid. Furthermore, the Supreme Court of the United States, In re Wilson, 140 U. S., page 581, speaking through Justice Brewer, says, on page 581:

"IF THE TWO HAD BEEN PRESENT AND HAD VOTED AGAINST THE INDICTMENT, STILL SUCH OPPOSING VOTES WOULD NOT HAVE PREVENTED ITS FINDING BY THE CONCURRENCE OF

THE TWELVE WHO DID, IN FACT, VOTE IN ITS FAVOR. IT WOULD SEEM, THEREFORE, AS THOUGH THE ERROR WAS NOT PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE PETITIONER."

In re Wilson, 140 U. S. 575-581.

Furthermore, Section 1025 of the Revised Statutes applies as well to irregularities in procedure as to deficits in form of indictment.

United States v. Cabban, 127 Fed. 713.

THE DEMURRER TO THE INDICTMENT WAS PROPERLY OVERRULED AND THE INDICTMENT IN THIS CASE IS SUFFICIENT TO FULLY AND FAIRLY APPRISE THE DEFENDANTS OF THE CHARGE THEY SHALL BE CALLED UPON TO MEET.

In the first place, and at this stage of the case, it is the rule in this Circuit that an indictment when attacked after verdict shall receive a liberal construction.

United States v. Dimmick, 112 Fed. 352, a decision, November 23, 1901, by District Judge DeHaven.

"Subtle reasoning is no longer permitted to obstruct the course of justice. It would result in refining all common sense out of the law and in the adoption of rules too technical and minute for the social conduct of men."

In re Rowe (Circuit Court of Appeals), 8th Circuit, 77 Fed. 166.

"If the sense be clear, nice exceptions ought not to be regarded, in respect of which Lord Hale (2 Hale's P. C.

193) says that 'more offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offenses escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy and the dishonor of God.' "

Lehman v. United States (Circuit Court of Appeals), 2nd Circuit, 127 Fed, pages 45 and 46.

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

Aiken v. Wisconsin, 195 U. S., top page 206.

After verdict no indictment shall be deemed insufficient for any defect which shall not tend to the prejudice of the defendant.

Rev. St. U. S., Sec. 1025;
United States v. Rhoades, 30 Fed. 431, 434;
United States v. Chase, 27 Fed. 807;
Connors v. United States, 158 U. S. 408, 411;
Price v. United States, 165 U. S. 311, 315;
Wright v. United States, 108 Fed. 805, 810;
United States v. Dimmick, 112 Fed. 352, 354.

"An informal or imperfect allegation of an essential fact will be deemed a sufficient averment of such fact" after verdict.

United States v. San Francisco Bridge Co., 88 Fed. 893;
United States v. Noelke, 1 Fed. 426, 431, 432.

Whatever defects then exist not consisting in the *total want* of essential averments are cured after verdict; and if the indictment read in the light of ordinary understanding and intelligence apprises the defendant of the charge against him, it is sufficient.

Markham v. United States, 160 U. S. 319, at p. 325;
Lehman v. United States, 127 Fed., pages 47 and 48.

In this respect it is also to be noted that the Supreme Court of the United States has laid down the rule that the Government is not to be entrapped into making allegations of an impracticable standard of particularity, and that averments which convey a general understanding of the crime charged (in this case, conspiracy) are sufficient.

Evans v. United States, 153 U. S. 584.

See also,

United States v. Eddy, 134 Fed. 114, 116, 117.

"The true test of the sufficiency of the indictment is whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and shows to what extent he may plead former acquittal."

And further to the same point, the Supreme Court of the United States holds as follows:

"Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described

in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. **Where the statute completely covers the offense, the indictment need not be more complete by specifying particulars elsewhere obtained."**

Ledbetter v. United States, 170 U. S., 606, page 612.

"It is equally true that the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. **The accused was not entitled to more nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment.** The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning and according to the rules of pleading, THE DEFENDANT WAS INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM."

Burton v. United States, 202 U. S. 344, page 372.

Looking particularly to the recognized rules of criminal pleading, the practical interpretation given by long usage to indictments is that words such as "knowingly and wilfully," and hence the words, "knowingly, wickedly and cor-

ruptly," apply to all which follows them, although the grammatical connection is not strictly made.

United States v. Adler, 49 Fed. 736.

Blake v. United States, 71 Fed. 286, middle of page 290;

United States v. Nathan, 61 Fed. 936, 938;

Browne v. United States, 145 Fed., page 1, all of the matter in the last paragraph of page 5.

Observing the rule that these words used in an indictment are to be construed grammatically as qualifying all of the matter thereafter charged, it likewise follows that they must be read in connection with, and entirely through this indictment.

Judge Deady says, in

United States v. Thompson, 31 Fed. 331, at page 335, bottom of page.

"Commenting upon the case of Commonwealth v. Douglas:

"The allegation in the indictment, 'The defendant suborned the said Fanny Crosman to commit perjury'—in my judgment this charge covers the whole ground and by a necessary implication includes all the elements of the crime of subornation of perjury."

(United States v. Thompson, page 335.)

In respect of the same matter, Judge Hammond, of the Western District of Tennessee, in his famous opinion in the case of

United States v. Howard, 132 Fed. 325,

commenting upon the case of United States v. Thompson, *supra*, says, on pages 352 and 353:

"For, while the indictment did not state in detail the facts of the subornation, it did state that the defendant knew that the witness would swear falsely and commit the crime of perjury, from which it necessarily follows by implication *that he knew that the oath on the part of the witness would be wilful.*"

United States v. Howard, 132 Fed., top of page 353;
United States v. Cobban, 134 Fed. 293.

It may be well assumed after verdict that all the necessary facts appeared in evidence and that the accused was not ignorant of the nature of the inquiry or of the charge to which his actions related and to which the indictment referred, and the indictment, within the principles set forth, reasonably presented to the common understanding all the necessary elements of the gist of the offense, together with all the equivalents of the offense in plain language, which he, with others, conspired to commit, satisfies every reasonable rule of the law.

Markham v. United States, 160 U. S. page 325;
United States v. Eddy, 134 Fed. 114;
United States v. Clark, 37 Fed. 107;
Noah v. United States, 128 Fed. 270, at page 272, a decision of this Court delivered by Presiding Judge Gilbert.

It is urged by the plaintiff in error that the agreement entered into was not enforceable, but this Court has held that that makes no difference.

Boren v. United States, 144 Fed. 801, 804, 805.

The essentials of a conspiracy are mutual assent, con-

scious participation or a combining of two or more minds coupled with the purpose sought.

"Conspire" is a word in common use, which necessarily carries with it the idea of agreement, concurrence and combination; and when one person is charged with conspiring with another there are no words in the English language by which the idea of action and co-operation of two minds could be more effectively conveyed, since one cannot agree or conspire with another who does not agree or conspire with him.

State v. Slutz, 30 South. 298, 299, 106 La. 182.

The **"means"** *in a conspiracy case under the second division of the statute* "to defraud the United States in any manner or for any purpose," *are not required to be alleged, and are immaterial.*

In *United States v. Gordon,* 22 Fed. 250, the Court says, page 251:

"The first count is good. The section of the statute (5440) makes it a crime to conspire to defraud the United States in any manner, and the cases cited from the state courts which hold that a conspiracy to defraud is not criminal, unless it is a conspiracy, to defraud in a manner made criminal by statute, have no application to indictments under Section 5440. **It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose,** and the Court does not care to know whether the modes adopted to accomplish the end proposed is made criminal or not. The second count is

sufficiently clear in its statements, and the acts which it is alleged the defendant conspired to do would defraud the Government. Each count is followed by allegation of a large number of acts done in pursuance of and to effect the object of the conspiracy, and these allegations are identical. I think the lands are sufficiently described, and the defendant is reasonably informed of the particular instances intended and referred to. The third count is good. It charges with sufficient particularity that the defendant, with others, conspired to defraud the Government out of the land by a pretended compliance with the pre-emption laws at the Duluth land office, in which district the lands are situated. The fourth count is good. It charges that the defendant and others conspired to defraud the Government out of the lands by a pretended compliance with the pre-emption laws, for the purpose of selling them to the defendant. It charges a contrivance to secure the privilege of pre-emption, and a combination to defraud the Government."

In *Sprinkle v. United States,* 141 Fed. 815, the Court adopts Mr. Wharton's doctrine as follows:

"'The means of effecting criminal intent,' says Mr. Wharton, 'or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury, to demonstrate the intent, and not necessary to be incorporated in the indictment.' 1 Whart., § 292."

See also—

United States v. Dennee, 3 Woods, 47.

United States v. Goldman, 3 Woods, 187.

The Circuit Court of Appeals for the Eighth Circuit, in the case of

Stearns v. United States, Feb. 1, 1907, 152 Fed. 900,

to face page 904,

speaking through Circuit Judge Van De Vanter, said:

"We are aware that there is persuasive authority for the "position taken by the learned judge who presided at the "trial, that under section 5440 the means of effecting the "object of the conspiracy do not constitute an element of "the offense and need not be stated in the indictment, or, "if stated, need not be so fully described or so supple-"mented by the statement of other matters as to make their "adequacy apparent. United States v. Dustin, 25 Fed. "Cas. 944, No. 15,011; United States v. Dennee, 25 Fed. "Cas. 818, No. 14,948; United States v. Gordon (D. C.), "22 Fed. 250; United States v. Benson, 17 C. C. A. 293, "298, 70 Fed. 591, 596; Gantt v. United States, 47 C. A. A. "210, 108 Fed. 61. See, also, United States v. Cruick-"shank, 92 U. S. 542, 558, 23 L. Ed. 588; Pettibone v. "United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. "Ed. 419; Dealy v. United States, 152 U. S. 539, 544, 14 "Sup. Ct. 680, 38 L. Ed. 545."

Now, these plaintiffs in error with all subtility and acumen able counsel can furnish, wish to overturn the foregoing principles on the assertion that the evidence discloses the *"means"* alleged to be ineffective.

Well, this position admits "means" alleged, and we shall show them to be sufficient to defraud the United States.

Competent allegations of knowledge are in the indictment (see, *ante*, this brief "History of Case," pages V and VII), but with reference to this matter of a "**Scienter**" the Circuit Court for the District of Oregon has *already* decided in the case of United States v. Mitchell, 141 Fed., page 666, speaking through District Judge Hunt, as follows:

"An indictment under Revised Statutes §5440 (U. S. Comp. St. 1901, p. 36761), which charges that defendants knowingly, unlawfully, wickedly and corruptly conspired to defraud the United States out of its title to certain public lands by means of false, fraudulent and fictitious entries of the same under the land laws, and that in pursuance of, and to effect the object of, such conspiracy, certain acts set forth were committed by one or more of the defendants, is not insufficient because it does not expressly aver that such acts were done with knowledge of the fraudulent and illegal character of the entries. The essence of the offense is the conspiracy, and while an overt act is an essential element under the statute, the use of the word 'knowingly' in charging the conspiracy must fairly be held to apply to and characterize the acts specifically charged to have been done in furtherance of such conspiracy, and for the purpose of carrying it into effect."

In the United States v. Stone, 135 Fed., page 392, it was held that the indictment under Section 5440 in conspiracy to defraud the United States need not aver an intent upon the part of the accused, for the intent to defraud will be inferred from the matter set out in the indictment. *The distinction between a conspiracy to commit an offense and*

a conspiracy to defraud the United States is well pointed out on page 297 *of the same Reporter in this case,* and the Court in considering another case from this Circuit on page 398, uses this language:

"In United States v. Thompson (C. C.), 29 Fed. 86, it was held that the section as it now stands 'must be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or anything otherwise than as the law requires or allows.' "

Everyone is presumed to know the natural consequences of his own acts. The persons, therefore, referred to in the indictment could not have been induced and persuaded without knowing whereof and what for, nor could it have been possible, considering the workings of the mind, for anyone to persuade or induce another without knowing what he was persuaded and induced about.

"If previous to this forming of their unlawful common design or understanding, if one ever was formed, defendant Newton, or any other person, had been doing the very act which afterwards by being committed to effect the conspiracy, ripened the statuory crime of conspiracy, then there would be the guilty participation necessary to the crime."

United States v. Newton, 52 Fed 285.

The doctrine for which the government here contends, that an indictment under Section 5440 of the Revised Statutes need not aver with exact accuracy the date of the formation or the beginning of the conspiracy nor that it

be proven that the conspiracy was formed and begun at the date given in the indictment, but that *the essential point is that the conspiracy existed before the date of the overt act charged and continued to exist at the time the overt act was committed, is fully upheld in*

Bradford v. United States, 152 Fed. 617.

United States v. Newton, 52 Fed., top page 284.

United States v. Potter, 56 Fed. 97.

United States v. Francis, 144 Fed. 521, at page 524.

The offense constituted by Section 5440 of the Revised Statutes consists of the combination, plot or agreement and the acts done by either or any of the parties thereto to carry the combination, plot or agreement into execution and effect its ultimate purpose.

United States v. Cole, 153 Fed. 801.

Ware v. United States, 154 Fed. 577.

The conspiracy statute of the United States defines an overt act as *"any act."* It may be innocent. It may be lawful. Any act can be taken which of itself, or with other facts or acts, tends to effectuate, render more certain of accomplishment the general plan conceived originally.

In the case of

United States v. Donau, 11 Blatchf 168, 25 Fed. Cases 890,

Judge Benedict says:

"The offense is the conspiracy. Some act by some one of "the conspirators is required to show, not the unlawful "agreement, but that the unlawful agreement while sub- "sisting became operative. The offense of conspiracy is

"committed when to the intention to conspire is added the "actual agreement, and this intent to conspire coupled "with the act of conspiring completes the offense intended "to be created by the statute, notwithstanding the re- "quirement that the prosecution show by some act of some "one of the conspirators that the agreement went into "actual operation. **If then, an indictment correctly "charges an unlawful combination and agree- "ment as actually made, and, in addition, de- "scribes an act by any one of the parties to the "unlawful agreement as an act intended to be "relied on to show the agreement in operation, "it is sufficient, although upon the face of the "indictment it does not appear in what manner "the act described would tend to effect the "object of the conspiracy."**

In a recent case the Circuit Court of Appeals for the Eighth Circuit on April 29, 1907, had occasion to consider what constituted in law a "continuing offense" and in the case of Armour Packing Company v. United States, the Court, speaking through Circuit Judge Sanborn, said:

"A continuous offense is a continuous unlawful act, *or series of acts set on foot by a single impulse and operated by an intermittent force,* however long a time it may occupy."

Armour Packing Co. v. United States, 153 Fed Rep., page 5, bottom of page 5.

Considering the indictment, however, from the viewpoint of the criticisms of the plaintiffs in error, we bring to it the light of modern adjudged cases, and submit that fair

examination shows the indictment good within the following cases:

Dealy v. United States, 152 U. S. 546 and 547;
Gantt v. United States, 108 Fed. 61, page 62;
Wong Don v. United States, 135 Fed. 704, 705;
United States v. Benson, 70 Fed. 591, at page 596;
United States v. Curley, 122 Fed. 738;
United States v. Curley, 130 Fed. 1;
McGregor v. United States, 134 Fed. 187;
Conrad v. United States, 127 Fed. 798;
United States v. Cunningham, 129 Fed. 833;
United States v. Stone, 135 Fed. 392;
United States v. Greene, 136 Fed. 618;
United States v. Mitchell, 141 Fed. 666;
United States v. Greene, 146 Fed. 766;
Same case, 146 Fed. 888;
Same case, 146 Fed. 889-890;
United States v. Bradford, 148 Fed. 413 (D. C.);
United States v. Booth, 148 Fed. 112;
United States v. Richards, 149 Fed. 443;
United States v. Brace, 149 Fed. 875;
Bradford v. United States, 152 Fed. 617 (C. C. A.);
Stearns v. United States, 152 Fed. 900-906;
Stearns v. United States, 152 Fed. 906;
Armour Packing Co. v. United States, 153 Fed. 5;
Van Gesner v. United States, 153 Fed. 46;
United States v. Cole, 153 Fed. 801;
Greene v. United States, 154 Fed. 401;
Ware v. United States, 154 Fed. 577.

In Stearns v. United States, decided February 1, 1907,
152 Fed. Rep. 900,
the doctrine contended for in these appeals by the government is advanced and sustained, viz: that a conspiracy to defraud the United States of the possession of public lands by means of fraudulent entries is within Section 5440, although there is no purpose or plan to carry the preliminary entries to final entry and patent, that is, it did not include the acquisition of title.

Stearns v. United States, 152 Fed. Rep. 906.

In the course of this opinion the Court said:

"To secure the entry by feigning to earn the title by faithfully and honestly complying with the law is to secure it fraudulently and to then use it as a mere cover for obtaining or prolonging the unlawful possession is to defraud the United States of the possession."

As to this aspect of the case we may employ the language of Judge Parlange in the Bradford case, affirmed by the Circuit Court of Appeals of the Fifth Circuit in 152 Fed., p. 617:

"(B) DEFRAUDING THE UNITED STATES.

"It is beyond question in my opinion, that to constitute "a conspiracy to defraud the United States under Rev. "St., Sec. 5440, it is entirely unnecessary to either allege "or prove a purpose to defraud the United States of a "thing of pecuniary value. The confusion as to the con- "tention made that to constitute a conspiracy to defraud, "under Rev. St., Sec. 5440, there must be a purpose of de- "frauding the United States of pecuniary value, arises "from the failure to distinguish between the purpose of

"statutes intended to punish cheats and frauds by private "persons committed against other private persons, and "the purpose of Rev. St., Sec. 5440, which is intended to "punish frauds against the sovereign. So far as my "knowledge goes, all the statutes of the former class, both "in this country and in England, provide, either in express "terms or by clear intendment, that the cheating or de- "frauding must be a thing of value. Such is the entire "extent to which those statutes go, and, of course, in prose- "cutions under them, it is essential to allege and prove "that the purpose of the defendants was to defraud others "of things of value. But no such restriction is found in "Rev St., Sec 5440, either in terms or by intendment. It "uses the broadest possible language. It punishes all who "conspire to defraud the United States 'in any manner and "for any purpose.' It is certainly just as important that "the government should not be defrauded with regard to "its operations, even if no pecuniary value is involved, as "that it should be defrauded of its property. In fact, I "believe that it is far more important that the government "should be protected against the former class of frauds, "and it would be astonishing, indeed, if Congress had failed "to afford protection against such frauds.

"The matter is so fully and ably discussed in the unani- "mous decision of the Circuit Court of Appeals for the "First Circuit in the case of Curley v. United States, 130 "Fed. 1, 64 C. C. A. 369 (a conspiracy to defraud in a civil "service examination), that I deem it unnecessary to at- "tempt to deal further with the matter. Specially notice

"McGregor v. United States (Fourth Circuit), 134 Fed., "at page 195, 69 C. C. A. 477, and cases there cited.

"Although I have stated herein my opinion that the "United States may be defrauded even when no pecuniary "value is involved, it should be specially noted that, under "the facts of this cause, the Court did not go into that "question with the jury. It should also be noted that the "Court granted without modification special instruction "No. 11 concerning conspiracy, etc., requested on behalf "of defendant Bradford, but applying by its language to "both defendants.

"While the following matters of law may have but little "bearing on this cause, as an effectual and successful con- "spiracy was shown, they may still have some value in the "general consideration of the cause. In prosecutions under "Rev. St., Sec. 5440, it need not be averred or shown that "the conspiracy was successful. Gantt v. United States "(Fifth Circuit), 108 Fed. 61, 47 C. C. A. 210. It is not "necessary to show that the conspirators received pecu- "niary advantage from the conspiracy. United States v. "Newton (D. C.), 52 Fed. 275; United States v. Allen, "Fed. Cas. No. 14,432."

U. S. v. Bradford, 148 Fed. 417.

In accord with these same considerations we find the Circuit Court of Appeals for the Eighth Circuit in *Ware v. United States,* 154 Fed. 577, where Circuit Judge Sanborn, speaking for the Court on page 584, states:

"But the purpose of the homestead laws is to induce set- "tlement, cultivation, and the establishment of homes upon "the public lands. The law requires the homesteader to

"reside upon his land at least one year before he may take "his proof of title. It requires him to make an affidavit "before he enters the land that he applies to enter it 'for " 'his exclusive use and benefit and that his entry is made " 'for the purpose of actual settlement and cultivation, not " 'either directly or indirectly for the use or benefit of any " 'other person.' Rev. St. §2290. It is true that a home- "steader may lawfully cut and remove such timber from "the public lands he enters as is necessary for him to re- "move and enable him to reside upon, improve, and culti- "vate the land before his final proof. But the cutting of "the timber or any other use of the land or of its products "by him prior to his final proof must be incident to his "actual cultivation, improvement, and living upon the land "in good faith, to procure his homestead for his own bene- "fit. Grubbs v. U. S., 105 Fed. 314, 320, 321, 44 C. C. A. "513, 519, 520; Conway v. U. S., 95 Fed. 615, 619, 37 C. "C. A. 200, 204.

"The use of the land entered by a homesteader, together "with adjacent lands by another person for grazing pur- "poses, until the entryman makes his final proof or dis- "poses of his holdings, without the reservation or applica- "tion of any part of the land or of its use to cultivation or "to residence thereon, is inconsistent with the purpose and "spirit and violative of the provisions of the law, and an "agreement to procure homesteaders to make entries of "public lands in order that third persons may obtain such "use from them is an unlawful agreement. It is a con- "tract to induce homesteaders to make applications to "enter lands, not for their exclusive use and benefit, but "for the use and benefit of another in violation of the oaths

"they are required to take when they make their applica-
"tions to enter, and there was no error in the refusal of
"the Court below to instruct the jury that such a contract
"was not an unlawful conspiracy. If qualified homestead-
"ers could lawfully lease or grant the use of the lands they
"might enter to others, without restriction or reservation,
"until they should prove up or dispose of their holdings,
"third parties might appropriate to themselves by the use
"of successive homesteaders, who would dispose of their
"holdings before they made proof of title, large tracts of
"the public domain for indefinite periods, and might
"thereby retard or prevent the use or sale of these lands
"by the United States."

In *Stearns v. United States* attention is called to a very relevant and important distinction. The trial court there instructed the jury that if the charge was otherwise established it was within the statute even though the purpose was confined to defrauding the United States of the possession and did not include the acquisition of title.

Stearns v. United States, 152 Fed., page 906.

In this case the Court, speaking through Judge Van Devanter, says, 152 Fed., page 906, after referring to the facts in that particular case, which was a conspiracy to secure homestead entries to control land for grazing purposes, said:

"The purpose in this was, not to initiate and secure lawful homestead entries on behalf of bona fide applicants, but to enable those who had the lands unlawfully inclosed to continue in the exclusive use and occupancy of them, as against the United States and the public, during the five-

year period prescribed for earning title under the homestead law. Many acts, including those specified in the indictment, were done by one or both of the defendants to affect this purpose. Whether or not it was also the purpose that the preliminary entries should be carried to final entry and patent for the benefit of the defendants, or the ranchmen and stockgrowers in whose behalf they were acting, was the subject of conflicting evidence.

"The Court, in effect, instructed the jury that, if the charge was otherwise established, it was within the statute, even though the purpose was confined to defrauding the United States of the possession of the lands by means of fraudulent homestead entries, and did not include the acquisition of the title. This, it is urged, was error, because, first, the United States could not be defrauded of the possession by anything short of what would pass the title; second, its possession of public lands is theoretical only and not a thing of value; and, third, the indictment, in charging the conspiracy, uses the word 'entries' only in the sense of final entries. We cannot assent to these contentions.

"The homestead law plainly confers the right of possession upon the entrymen when the preliminary entry is made, for it makes actual settlement, followed by residence and cultivation for a period of five years, a condition to obtaining the title, and requires the applicant to make and file, with the application for the entry, an affidavit 'that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for.' Rev. St., Sec. 2290; Act March 3, 1891, c. 561,

Sec. 5, 26 Stat. 1905 (U. S. Comp. St. 1901, p. 1389); Rev. St., Sec. 2291 (U. S. Comp. St. 1901, p. 1390); Shiver v. United States, 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 El. Ed. 231; Peyton v. Desmond, 63 C. C. A. 651, 662, 129 Fed. 1, 12. But the right to the possession, like the right to make the entry, is extended only to those who intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently, and to then use it as a mere cover for obtaining or prolonging an unlawful possession is to defraud the United States out of the possession."

THE STATUTE OF LIMITATIONS.

The foregoing authorities we believe amply demonstrate the indictment sufficient so far as showing a charge to defraud the United States in any manner and for any purpose.

Under the demurrer, though it was general, the matter of the statute of limitations was doubtless presented. By certain rulings on the admission of evidence the question is again presented in several different ways, but considering all of the assignments of error, they present the conclusion whether or not a conspiracy formed any time prior to three years next preceding the finding of the indictment can be prosecuted by an indictment found September 2, 1905, where overt acts were performed within the three-year period. We will now address ouaselves to this phase of the case.

We answer in the words of Judge Parlange:

"The statute of limitations. At common law, the con-
"spiracy alone constitutes the offense, without any overt
"act, and the conspirators can be prosecuted from the in-
"stant the conspiracy is formed. But under Rev. St., Sec.
"5440, no conspiracy can be prosecuted until an overt act
"is committed. I am fully aware of the statements found
"in the decisions to the effect that under Rev. St., Sec.
"5440, the gist of the offense is the conspiracy, and that
"the overt act is no part of the offense. Mr. Justice Woods
"so stated in United States v. Britton, 108 U. S., at page
"534, 27 El. Ed. 698. It may be interesting to notice, in
"passing, that it seems the same learned jurist had pre-
"viously held the reverse in United States v. Dennee, 3
"Woods, at page 50, Fed. Cas. No. 14,948. But those state-
"ments have never been made with regard to or affecting
"the question of the statute of limitations here presented.
"I agree fully that the overt act is not an element of the
"offense in the sense in which, in criminal law, a specific
"criminal intent, for instance, is an ingredient of an of-
"fense. Such ingredients are, as I believe, always culp-
"able, *per se*; whereas the overt act may be *per se*, and,
"considered independently of the conspiracy, a perfectly
"innocent act. But the indisputable fact remains that an
"offense under Rev. St., Sec. 5440, cannot be prosecuted
"until an overt act is committed. A criminal offense
"against the sovereign, which he cannot prosecute and
"punish, is, it seems to me, a matter which the legal mind
"cannot grasp. It is plain, then, that the statute of limi-
"tations is not set in motion by the forming of the con-
"spiracy, but that the moment the conspiracy is formed,

"and an overt act is committed by one of the conspirators "to effect the purpose of the conspiracy, that moment the "offense can be prosecuted, and the statute of limitations "begins to run as regards that conspiracy and that par- "ticular overt act. But I am absolutely unable to agree "that if, after committing the first overt act, the con- "spirators do nothing more for three years, and they are "not prosecuted within that time, they can thereafter con- "tinue the conspiracy, or renew it either publicly or se- "cretly and as often as they please, and that they can com- "mit as many acts as they choose to effect the object of the "conspiracy, and yet have absolute immunity from prose- "cution for the conspiracy. It is well settled, as I have "already said, that the overt act need not itself be an of- "fense. It might therefore be absolutely noncriminal *per* "*se*, and, being such, it could not attract the attention or "arouse the suspicion of the government. That immunity "from prosecution for the conspiracy would result from the "lapse of three years after the commission of the first "overt act, although the conspiracy were thereafter con- "tinued or repeatedly renewed, and many other overt acts "committed under it, is, to my mind, an utterly irrational "conclusion, which the law could never have contem- "plated.

"It was said during the trial that my view would lead "to the conclusion that for the same offense persons might "be subjected to many prosecutions. But this is entirely "incorrect. While the conspiracy *per se* might be the "same, yet if the conspirators chose to renew it, or to con- "tinue it in existence, and to commit new overt acts to "carry it out, the conditions under which the right of the

"government to prosecute would arise, would be different "every time a new overt act was committed. If, under "such circumstances, the conspirators are subjected, so far "as the statute of limitations is concerned, to a prosecu- "tion every time they commit an overt act, that result is "not brought about by any act of the prosecution in split- "ting up a continuous offense, as was attempted to be done "In re Snow, 120 U. S. 281, 7 Sup. Ct. 556, 30 El. Ed. 658, "a prosecution for unlawful cohabitation with several "wives, or by tolling the statute of limitations; but the re- "sult flows directly and conclusively from the acts of the "conspirators themselves. It might be said of their com- "plaint, as was said by the Supreme Court of Vermont, "quoted by the Supreme Court of the United States in "O'Neill v. Vermont, 144 U. S., at page 331, 12 Sup. Ct., "at page 696, 36 L. Ed. 450 (a prosecution for unlawful "selling of liquor, in which the defendant was convicted of "307 offenses, and sentenced, in the aggregate, to a fine of "$6,638.72 and to imprisonment for more than 55 years), "that the result is brought about, not by the law, nor by "any interpretation of it, nor by any act of the prosecu- "tion, but solely by the fact that the complaining defend- "ants committed too great a number of offenses. Obvi- ously, if the defendants had been charged with numerous "different conspiracies, completed, as regards the ability of the government to prosecute, by the commission "of many different overt acts, they would not be "heard to complain of a situation brought about "entirely by their own criminal acts, and which "subjected them to many prosecutions. What dif- "ference, so far as regards the statute of limita-

"tions, is there in principle between the condition just "stated and the proposition that there may be as many "prosecutions as there are overt acts, when the same con- "spiracy is renewed as each different overt act is commit- "ted? The conspiracy C, plus overt act A, create a crim- "inal condition for which the government can prosecute "under the terms of Rev. St., Sec. 5440, during three years "from the date of overt act A. The same conspiracy C, or "any other conspiracy, plus overt act B, create another "and a different criminal condition, for which the govern- "ment can prosecute during three years from the date of "overt act B. And so on. No court has ever held that "under Rev. St., Sec. 5440, the statute of limitations be- "gins to run from the original formation of the conspiracy, "and before the commission of any overt act. As I have "said before, it is inconceivable to me that the statute of "limitations should begin to run before the government "could prosecute. The difference of opinion is: (1) "Whether the statute of limitations begins to run from the "commission of the first overt act, regardless of any subse- "quent overt acts? Or (2) whether a prosecution begun "within three years of any overt act, committed to effect "the purpose of a conspiracy then in existence and in full "operation, is maintainable. The first view has been up- "held by Judge Deady, The Dorris Eckhoff (D. C.), 32 "Fed. 556, and Judge Bunn, Northwestern Mut. Life Ins. "Co. v. Cotton Exchange Real Estate Co. (C. D.), 70 Fed. "159, for whose opinions I have the greatest respect, but "with whom I am entirely unable to agree. The extraor- "dinary result of such a doctrine I have already referred "to. The second view, which in my opinion is the correct

"one, has been ably set out by the Supreme Court of Missis-
"sippi in American Fire Ins. Co. v. State (May 24, 1897),
"22 South. 99; by the Supreme Court of Pennsylvania in
"Com. v. Bartilson, 85 Pa. 487; by the Supreme Court of
"Illinois in Ochs v. People, 124 Ill. 429, 16 N. E. 662; by
"Judge Speer in United States v. Greene et al. (D. C.),
"115 Fed. 343; by the Supreme Court of New York in
"People v. Mather, 21 Am. Dec. 122-147, 4 Wend. (N. Y.)
"259, and by other authorities.

"It is well and fully settled that the commission of an
"overt act is, *per se,* a renewal of the conspiracy. Bish-
"op's New. Cr. Proc. Vol. 2, Sec. 206, and Vol. 1, Sec. 61;
"A. & E. Enc. Law (2d Ed.) Vol 6, verbo "Conspiracy,"
"p. 844, text and notes; American Fire Ins. Co. v. State
"(Sup. Ct. Miss., May 24, 1897,) 22 South., at pages 102
"and 103; Com. v. Bartilson, 85 Pa. 487-488; People v.
"Mather, *supra,* and other cases. However, I did not so
"charge the jury, although I would have been entirely
"justified in so doing. I charged, favorably to the defend-
"ants, that the jury had to find that the conspiracy existed
"and was in operation within three years, and that then
"they had further to find an overt act to effect the object of
"the conspiracy had also been committed within the three
"years.

"It is settled that the jury need not have found that the
"inception of the conspiracy took place within the three
"years. They had the right to go back to its origin for the
"purpose of determining whether it was continued or
"renewed and existed and was in operation within the
"three years. American Fire Ins. Co. v. State, *supra;* Mc-
"Kee v. State, 111 Ind., at page 382, 12 N. E., at page 512;

"Judge Speer in United States v. Greene et al. (D. C.) 115 "Fed. 343, and other cases. The doctrine as to the point "under consideration, which, in my judgment, is the cor- "rect one, is set out fully in the text of Am. & Eng. Enc. of "Law (2d Ed.) verbis 'Limitation of Actions,' Vol. 18, at "page 165. In foot notes on that page, it is made to appear "that the doctrine of the text is not in accordance with the "decision of Judge Bunn (United States v. McCord et al. "(D. C.) 72 Fed. 158), and the decision of Judge Deady "(United States v. Owen et al. (D. C.) 32 Fed. 534), "already referred to by me. Those two cases are the only "ones cited in opposition to the text on the question of "limitation. It should be noticed that while in one of the "same notes, the case of Dealy v. United States, 152 U. S. "538, 14 Sup. Ct. 680, 38 L. Ed. 545, is cited, that citation "is evidently meant to show that under Rev. St., Sec. 5440, "an overt act is required, and that the same is not part of "the offense. Dealy v. United States does not refer in any "way to the question of limitation involved in this cause."

Bradford v. United States, 148 Fed. 417 to 419.

In that case upon appeal the Circuit Court of Appeals for the Fifth Circuit adopted the foregoing decision of Judge Parlange as the law of the case.

Bradford v. United States, 152 Fed. Rep. 616.

In Commonwealth v. Bartilson, 85 Pa. St. 482, quoting Archbold's Criminal Pleading and Practice, 1056, the Pennsylvania Court says, "But if the overt act charged in the indictment or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the

parties thereto *first formed* the unlawful combination in their minds or gave effect to it by concerted action. If it has been renewed from time to time and overt acts committed through a series of years and one of said acts has taken place within two years, each renewal constitutes a fresh conspiracy for which an indictment will lie."

In the case of

Ochs v. People, 124 Ill. 399.

the Court considers an instruction which covers the very point of the opinion of the Court below. That *instruction* as given at page 429 in the opinion of the Illinois Court, was as follows:

"The crime of conspiracy was complete and the offense was committed when the crime or confederation was entered into and that the period of limitation would commence to run from the time of committing the offense."

The Supreme Court of Illinois says of *this instruction*:

"The instruction was calculated to lead the jury *erroneously* to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy instead of from the time of the commission of the *last overt act* in furtherance of the object of the conspiracy."

People v. Willis, 52 N. Y. 808, to face page 812,

the Court says:

"The conspiracy is an instantaneous crime, finished and complete at the alleged date of the concoction but a continuous one is one existing within the two years in active operation, as by overt acts."

In

Fire Insurance Cos. v. Mississippi, 75 Miss 24,

the Court says on pages 35 and 36:

"The well settled doctrine is that every overt act is a renewal of the original conspiracy then and there—a repeating of the conspiracy as a new offense."

In the case of

Lorenz v. United States, 24 Appeal Cases, D. C. 337, 386, 388,

the Court of Appeals of the District of Columbia, speaking to the question of the statute of limitations as applicable to the crime of conspiracy, said:

"12. The bar of the statute of limitations was raised by the defendants in two special instructions which the Court refused to give to the jury. These are as follows:

(Instructions omitted).

"The dates of the conspiracy, and of the several acts in furtherance of its object, as charged in the indictment, are given as within three years next before that instrument was presented by the grand jury.

"The contention on behalf of the appellants is that, if the conspiracy was in fact formed, and a single act in aid of its object committed, more than three years before the finding of the indictment, then the offense was barred by the statute of limitations; and that no other like act or acts, committed within three years, would amount to a renewal or continuance of the conspiracy so as to remove the bar.

"We cannot agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in Sec. 5440, Rev. Stat. (U. S. Comp. Stat., 1901, p. 3676),

though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be commited with impunity. *Through the repetition of such acts*—overt acts, as they are commonly called—*the conspiracy is made a continuing offense.* By each subsequent act it is repeated and entered into anew. *People v. Mather,* 4 Wend. 258, 21 Am. Dec. 122; *Com. v. Bartilson,* 85 Pa. 482; *Fire Ins. Cos. v. State,* 75 Miss. 24, 35, 22 So. 99; *Ochs v. People,* 25 Ill. App. 379, 414, 124 Ill. 399, 426, 16 N. E. 662; *United States v. Greene,* 115 Fed. 343."

In the case of

People v. Mather, 21 Am. Dec. 122, 4 Wend. 229,

it is held that the law considers that *wherever the conspirators act THERE THEY RENEW OR CONTINUE THEIR AGREEMENT* and the agreement is *RENEWED OR CONTINUED* as to all *WHENEVER* any one of them does an act in furtherance of their common design.

Within the explanations hereinbefore given of the term *"to defraud the United States in any manner for any purpose" United States v. Curley* and *McGregor v. United States* show it is conclusively evident that, in respect of the indictment at bar it need not appear therefrom that the United States would be defrauded, or that its land had been disposed of, or at least had passed so far as to become the property of an innocent purchaser, whereby the United States would be prevented from the recovery of the same.

All acts done (whether existing as a part of the first acts done or as an independent later act of a disconnected

variety from the acts previously done, but to further the object and extent of the purposes alleged in the indictment), are clearly acts within the purview of the definition given by the Curley case and the McGregor case, because under any or either of them the object and purpose was to effect the deception of, or practice an artifice upon, the United States in pursuance of the plan to defraud the United States.

United States v. Donau, 21 Blatchf. 168; 25 Fed. Cases 890.

After the joint design is fairly once established *EVERY OVERT ACT* done in pursuance of the original purpose, *whether by any of the conspirators or their agents* **is a renewal of the original conspiracy.**

McKee v. State, 111 Indiana, p. 378;

Tyner v. United States, Vol. 32 Wash. Law Rep. 258;

Palmer v. Colladay, 18 App. D. C. 426-433.

In

United States v. Greene, 115 Fed., top of page 350, Judge Speer, of the District Court of the United States for the Eastern District of Georgia, in February, 1902, held as follows:

"If it be true, as charged in this indictment, that this "scheme was formed as early as 1891 and its details were "from time to time put in operation and, finally, in 1897, "that it was made to apply to the particular works of the "Government then in progress, with a view to obtaining "fraudulently a share of the sums appropriated for the "public welfare, not only would there be no duplicity in

"the narration of successive steps, **but the final act, "even though the Statute of Limitations had in- "tervened as to other incidents, would remove the "bar and bring the entire scheme and all of its "details under the scrutiny of the Court,** in order "to determine from all the facts whether the parties were "guilty of a conspiracy which it is charged was renewed or "was completed at a date when the penal authority of the "law was in full force and effect."

The litigation in this case of United States v. Greene has become famous, and by reference to subsequent proceedings in it we find very many important points again before the consideration of the Court at a date some four years thereafter.

United States v. Greene, 146 Fed. 766;

United States v. Greene, 146 Fed. 766 to page 900.

Had the learned judge an inclination to change his opinion he certainly had the opportunity to do so from the examination of the various questions which were presented in this case and the length of time it has taken to try it, but Judge Speer has consistently held to his ruling on the question of statute of limitation.

United States v. Greene, 146 Fed. 803.

Furthermore, to make it entirely clear that Judge Speer has held consistently to the rule that prosecution cannot be determined at the date of the commission of the first overt act, but that the statute of limitations does not apply until three years have run from the commission of the last overt act, the Court is referred to the same case,

United States v. Greene, 146 Fed. 888-889.

On the last cited page the Court says:

"If the jury believe that these overt acts were committed "in pursuance of the conspiracy under which they are "charged, and that these acts were done through the co-"operation of these defendants, it would amount in law to "a renewal of the conspiracy at the date of the conclusion "of the overt acts charged and the statute of limitations "would not commence to run until the last overt act "charged under such conspiracy be counted and proven."

And Judge Speer was upheld in all of his views,

United States v. Greene, 154 Fed. 411.

Further, Judge Speer says:

"This is a well established rule. It has been held:

" 'But as each new overt act in furtherance of a common 'purpose becomes in law a new conspiracy, the time of the 'conspiracy may be laid within the period of the statute of 'limitations if the overt act was within that period; the 'prior combination, if established, and the later overt act 'being evidence from which a jury might infer conspiracy.'

"Such is the language of the Supreme Court of the United States."

Since the rendition of the opinion in the Greene case we are not without further and ample authority from respectable courts upon the same question in different districts, the principles of the cases being in thorough accord, but in absolute contravention of the doctrine announced by Judge Bunn.

United States v. Bradford, 148 Fed., page 417, page 418, page 419.

Both cases relied on below, viz:

United States v. McCord, 72 Fed. 159, and the decision of Judge Deady in

United States v. Owen, 32 Fed. 534,

being referred to, criticised, distinguished and applied in the Bradford case; and it was affirmed.

Bradford v. United States (C. C. A.) 152 Fed., p 617.

Furthermore, in the course of the opinion in the Bradford case it is dwelt upon that Justice Woods himself had *previously,* to the case of

United States v. Britton, 108 U. S. 204,

relied upon and cited in the case at bar, had himself expressed a converse opinion in the case of

United States v. Dennee, 3 Woods, p. 50

Fed. Cases 14,948.

Thereupon, the Judge states in the course of his opinion:

"But I am absolutely unable to agree that if, after com-
"mitting the first overt act, the conspirators do nothing
"more for three years, and they are not prosecuted within
"that time, they can thereafter continue the conspiracy, or
"renew it either publicly or secretly and as often as they
"please, and that they can commit as many acts as they
"choose to effect the object of the conspiracy, and yet have
"absolute immunity from prosecution for the conspiracy.
"It is well settled, as I have already said, that the overt act
"need not itself be an offense. It might therefore be abso-
"lutely non-criminal *per se,* and, being such, it could not
"attract the attention or arouse the suspicion of the Gov-
"ernment. That immunity from prosecution for the con-

"spiracy would result from the lapse of three years after "the commission of the first overt act, although the con- "spiracy were thereafter continued or repeatedly renewed, "and many other overt acts committed under it, is, to my "mind, an utterly irrational conclusion, which the law "could never have contemplated."

This doctrine is not only sound, but has the support of other authority and has been affirmed by the Apellate Courts.

United States v. Richards, 149 Fed. 443;
United States v. Brace, 149 Fed. 875;
United States v. Burkett, 150 Fed. 208;
Greene v. United States, 154 Fed. 411;
Ware v. United States, 154 Fed. 577.

After considering many of the foregoing authorities, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Ware v. United States,* on July 10, 1907, 154 Fed. 578, speaking through Circuit Judge Sanborn, said:

"On the other hand, the offense denounced by Section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if, by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, *the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.*"

After a plea of not guilty a general verdict of conviction establishes the fact that the act charged in the indictment was committed within the time fixed by the statute of limitations.

United States v. Francis, 144 Fed. 521;
United States v. White, Fed. Cases No. 16,676.

The doctrine is that the Government cannot be entrapped nor compelled to make allegations of an impracticable standard of particularity and so averments which convey general understanding of the crime charged are sufficient. It certainly cannot be incumbent upon the Government to allege facts in an indictment with any greater particularity than accrues from the acts of the parties themselves; **that is, no greater particularity can be required than were described or identified by the parties themselves at the time they entered into their alleged unlawful agreement.** Hence it is not an implication but a positive certainty that in the inception of the conspiracy and during its progress it might not have been known who the persons would be that the conspirators would ultimately engage to their purpose. If this were not so it would be necessary for the Court to hold that the conspiracy would be lawful, although it was to defraud the United States, unless the parties specifically agreed upon the identity of the persons whom they were to persuade and likewise specifically agreed upon the identity of the lands which they were to take, and likewise specifically agreed upon the character of persuasion and inducement to be offered.

The points urged by appellees are more refined than sound.

United States v. Stevens, 44 Fed. Rep., 141;
United States v. Wilson, 60 Fed. Rep., 891;
United States v. Eddy, 134 Fed. 114.

In this latter case Judge Hunt said, **"The steady tendency of the Courts of the United States undoubtedly is to disregard forms even though they be mistaken in expressing the substance of crimes and indictments if the meaning can be understood."**

United States v. Rhodes, 30 Federal 431.

Justice Brewer said in the case of United States v. Clark, 37 Federal 107, "I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common law practice, which even in criminal matters is yielding to the more enlightened jurisprudence of the present—a jurisprudence which looks more at the matter of substance and less at the matter of form."

Justice Brewer again, after he went upon the Supreme Bench in the case of Dunbar v. United States, 156 U. S., page 193, speaking for the Court, said, "The language of the indictment quoted excludes the idea of any unintentional and ignorant bringing into the country of prepared opium, upon which the duty had not been paid and is satisfied only by proof that such bringing in was done intentionally, knowingly and with intent to defraud the revenues of the United States."

In the case of Wright v. United States, 108 Federal, page 810, the Circuit Court of Appeals for the Fifth Circuit says, "That omission of words would add nothing to the meaning of an indictment seems so clearly a defect of form only as to be apparent." No one reading the indictment could come to any other conclusion in regard to its meaning, and when this is the case the indictment is good enough.

In the case of Rosen v. United States, 161 U. S., page 33, Justice Harlan of the Supreme Court says, "He must have understood from the words of the indictment that the Government imputed to him the knowledge or notice of the contents of the paper so deposited."

It is not the true test of any indictment that it might possibly have been made more certain or more specific or definite.

Peters v. United States, 94 Federal 127.

One of the most important rules which counsel for appellees overlook is enunciated in United States v. Greene, 146 Federal, page 766, as follows:

"For the purposes of determining a question like this the indictment must be construed not by one generic descriptions alone, but after full consideration of all its clear and substantial averments."

The Circuit Court of Appeals for the Sixth Circuit in the case of Davis v. United States, speaking through Circuit Judge Severens, in considering a conspiracy case charging the conspirators with the commission of an offense in violation of Statutes Sections 5508 and 5509, Revised, said: **"If the evidence shows a detail of**

facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referrable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

In a recent case in the Ninth Circuit and from the very jurisdiction in which the indictment under question in this case took its source, the Circuit Court of Appeals on the 11th day of March, 1807, delivered an opinion, through Circuit Judge Ross, *Van Gesner v. United States,* 153 Federal, page 46 to face page 54:

"It is not the name but the essence of the thing that should control the Court in the administration of justice. As has already been said, the gist of the offense charged against the plaintiffs in error was the conspiracy, the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the Government title to the desired lands. 'In stating the object of the conspiracy,' said the Court, in United States v. Stevens (D. C.) 44 Fed. 141, 'the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they make a defense.' See also

Noah v. United States, 128 Fed. 272, 62 C. C. A., 618; United States v. Eddy (C. C.) 134 Fed. 114; U. S. v. Rhodes (C. C.) 30 Fed. 431.

"We are of the opinion that the indictment is sufficient, and that the Court below did not err in permitting proof of the false swearing of the instigated parties, both in respect to their declaration in the verified written statement of application to purchase, and in the final proof made by deposition."

THE ADMISSION OF EVIDENCE AND RULINGS THEREON AND INSTRUCTIONS OF THE COURT

Counsel for plaintiffs in error seem to attach much importance to the introduction in evidence of the affidavit of witness Wells, made before Neuhausen, which is Government's Exhibit 25 (Transcript of Record, page 902.)

In relation to this step in the trial it must first be observed that counsel admit that the purpose of their cross-examination of this witness before the introduction of the affidavit *was for the purpose of showing that the extracts* from the affidavit concerning which Wells was so interrogated by counsel (Transcript, pages 900-901) prior to its introduction in evidence, *were contradictory to the previous testimony of the witness.* (Transcript of Record, pages 850-856.) In a word, that the witness had made contradictory statements concerning these matters.

All the testimony of the witness Wells is not in the Record. It is proper to conclude that much of the cross-examination of plaintiffs was, therefore, either as they

now admit, to contradict and challenge the credibility of the witness or by *preliminary interrogation* lay ground for the benefit of discovery of some further facts more favorable to the defense from the oral examination of this witness respecting the correctness of his written statement as compared with his testimony given subsequent thereto upon the trial.

Neither the section of Wigmore, the O'Brien case nor the Artery case cited by plaintiffs in error apply to this situation. But if we concede, for illustration, they do, then the answer is this:

Counsel interrogated the witness themselves admittedly to their purposes of the case.

Wigmore on Evidence, Vol. II, Section 1385, subdivision (3), says of this:

"The interrogation of an *opponent* by way of discovery is in itself in the nature of a cross-examination and secures all the benefits of it."

That is, secures all the benefits of cross-examination. So the affidavit then is not *ex parte.*

Furthermore, this affidavit was a *"previous evidenciary statement of the witness,"* and when interrogated concerning it by plaintiffs in error the witness affirmed it as correct. (Transcript of Record, page 901).

It therefore became a record, under the eye and ear of counsel and in presence of defendants, verified and adopted by the witness. It thus became a part of the testimony of the witness. It was offered as a statement of the whole conversation between witness and the officer. (Transcript of Record, top page 902.)

Counsel then objected generally (Record, page 902),

not on the ground of prejudicing defendants or depriving of right of cross-examination, or that it was hearsay or any other specific reason. The right of confrontation of the witness was not denied plaintiffs in error. *Wells was on the stand.* To experiment admittedly to contradict the witness or affect his credibility and then complain of the result at this late date as an afterthought on more specific grounds, does not well become the able counsel for plaintiffs in error.

Again, all the matters contained in this affidavit went to the jury by testimony out of the mouth of the witness while sitting on the stand and subject to cross-examination.

It cannot avail counsel to say that this was not so, because the record must affirmatively show error. It will not be presumed. All the testimony of the witness Wells not being in the record, it must be presumed that other testimony was given. The Record says, page 900: "Upon the re-assembling of the Court, and after *some testimony was given by the witness* he testified, etc." What was the *"some testimony"?*

The fact of mere inspection alone, as is now claimed, does not make for error alleged. The fact is they wanted to show contradictions and impair credibility of the witness; and, moreover, so stated to the Court and so led the Court to believe.

Now the principle which entirely justifies the presentation of this affidavit to the jury is found in Wigmore at Section 754, Vol. 1, page 847:

"If by verifying and adopting the record of *past recollection* the witness makes it usable testimonially, and if

by this verification alone can it become so usable, it follows that the record thus adopted becomes to that extent the embodiment of the witness' testimony. Thus (a) the *record verified and adopted becomes a present evidenciary statement of the witness;* (b) and as such it may be handed or shown to the jury by the party offering it."

And he concludes by saying, Section 754, top of page 849, that those cases which refuse to allow such verified and adopted record of past evidenciary statement to be "read in evidence" or "given in evidence" after its verification and adoption as a *"present* evidenciary statement" must be regarded as unsound in principle.

Curtis v. Bradley, 67 Conn. 99;
Same case, 31 Atlantic 591.

It seems to us counsel for plaintiffs in error beg the very meat of this question. They instance in their brief the supposition that if the District Attorney had affidavits of all the witnesses and defendants' counsel asked for them, to claim then the right to read the affidavits and keep the witness off the stand would deprive the defendants of their Constitutional right to meet the witnesses face to face.

But the fact is this witness Wells was on the stand and all defendants joined in the experimental examination of testing his credibility and of showing or attempting to show contradictions.

The situation is then this: Reading from the past record counsel asks did you state so and so, and is that correct, answered yes, and so forth (Transcript of Record, page 901), the witness being then on the stand. This is

admittedly to affect the credibility (Transcript of Record, page 902). How otherwise can that credibility so slurred at be measured correctly by the jury if they do not receive all the accompanying facts and circumstances in connection with the whole statement and the previous oral testimony given on the trial by the same witness.

So the Court below, under the objection then made properly, in view of the attitude of counsel and the then state of the case, acting within its plenary discretion in respect of which no abuse is shown or alleged, admitted the Wells affidavit.

Counsel further complain of "Govt. Ex. 26," Transcript of Record, page 911, then offered with the Wells affidavit and as part of the same. This was properly admitted. But if it can be said that it was not, the complaint now made does not avail, for "Govt. Ex. 212," Transcript 957, Jones' letter of April 23, 1904, has as a part thereof, the same agreement. See Transcript of Record, page 598 last four lines of the top paragraph on that page, and pages 604 to 608, Transcript of Record, where Jones' own sworn certificate identifies the instrument. Govt. Ex. 212 was competent and the agreement went in with it. So no prejudice could result.

The general principle upon which the government relied, without descending to particulars, is well illustrated in the case of *Ware v. United States,* where the Court said, 154 Fed. page 580:

"The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent

execution of its scheme which controlled the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the Court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons with the three years to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the *res gestae,* may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. Drake v. Stewart, 22 C. C. A., 104, 107, 76 Fed. 140, 143."

Within our view of the case we might rest with this general principle and submit the case, but inasmuch as counsel for plaintiffs in error have seen fit to draw into their brief many criticisms which seem to us based upon state practice and in respect of which it is insisted that there can be no just application to a case in the Federal Court, we look further into the authorities for general

guidance upon the rules which govern a case of this character in the Federal Court. The *Ware* case above cited, it will be observed, is in the *Circuit Court of Appeals for the Eighth Circuit.*

In the *Circuit Court of Appeals for the Seventh Circuit,* that Court, speaking through Circuit Judge Grosscup, said, in *Lang v. United States,* 133 Fed. 204:

"Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as state statutes or decisions may be persuasive, to the statutes of decisions prevailing in the particular state where the Court happens to sit; otherwise each state would have a substantial part in determining the manner in which the Courts of the United States should enforce not the law of the state, but the national laws."

The Circuit Court of Appeals for the First Circuit, considering a very important conspiracy case, *Grundberg v. United States,* 145 Fed. page 81, to face page 92, Circuit Judge Putnam speaking for the Court, says,

"The Court, referring to the point that the witness testified generally as to the correctness of the facts stated in the memorandum which he produced, observed that, if the evidence of the witness had not been satisfactory, his cross-examination should have been placed on the Record. In view of the instructions to the jury to which we have referred, and in view of the fact that Lehmann and Schlaepfer each testified positively that they knew certain

important matters as to which they testified, it seems impracticable for an Appellate Court, on such a statement as we have here, to sift out the record and reverse the judgments because of a possible difference of opinion between the Appellate Tribunal and the Trial Court as to how far the evidence should have been submitted to the jury for it to determine to what extent the testimony of the witnesses in question should be accepted in accordance with the instructions we have cited. As each of the witnesses plainly had knowledge of a part of a chain of events, and as the Court had clearly instructed the jury to accept their testimony only to the extent of that personal knowledge, whatever else they apparently testified might, unless the record was full, be taken from our consideration."

These conclusions were reached in that case where the objections were to the point that the witness could not have had knowledge concerning the facts that he testified about.

In *United States v. Newton*, 52 Fed. 275, in a case of conspiracy to defraud the United States by fraudulently increasing the weight of mail matter, the Court in that case said:

"It is not necessary, to justify a verdict of guilty, that the conspiracy should have been formed and in full existence prior to the weighing of such fraudulent mail matter. It is sufficient, if the defendant and any other person at any time during the weighing, formed a common design to defraud the Government in connection with such weighing, and that then the defendant or such other person committed an overt act in connection therewith."

The facts produced in evidence before the jury in this

case show beyond peradventure that the defendants knew by actual participancy of the things done and the purpose for which they were done.

United States v. Bradford, 148 Fed. page 413, at face pages 424 and 425.

But what we deem more especially to support the sufficiency of this verdict incidentally arises, beyond any consideration of justifying the admission of evidence or the Court's instructions, *as a matter of procedure.* Taking the objections, and assignments of error based thereon, by their length and breadth, challenging the sufficiency of the indictment by questioning the evidence introduced under its allegations, all these objections raised in this way are to our mind waived by the action of the accused in subsequently proceeding to offer evidence in their own behalf as to the very matters thus previously objected to.

Burton v. United States, 73 C. C. A. 243; 142 Fed. 57;

School District v. Chapman, 152 Fed. 887;

Stearns v. United States, 152 Fed. 905.

As has been frequently pointed out, a conspiracy case necessarily depends for proof upon the circumstances surrounding it. The principle of law which has the sanction of all respectable Courts, is this: *If the circumstances surrounding the transaction under investigation are so intimately connected with each other and the principal facts at issue that it would result in depriving the jury of consideration of the accompanying circumstances if shut out, it is proper to admit them.* This doctrine has the support of the *Circuit Court of Appeals for the*

Fourth Circuit in the case of *Sprinkle v. United States,* 141 Fed. 811. The Court speaking through Judge Waddill, says, citing many authorities:

"In the present case, five persons are charged with the conduct of a business, lawful in itself, but which became unlawful because of the intent with which it is charged to have been carried on; and it is alleged in the indictment, that the purpose of the three companies within the State of North Carolina was the better to effect the unlawful object; and from the proof it appears that four companies in three different states of the Union were also used to effect such unlawful undertaking—that is, to defraud the United States—and that the said defendants jointly, as individuals, and in the names of the said companies, were knowingly engaged in defrauding, and did defraud, the Government of its revenue. This necessarily involved a variety of transactions, covering many times and places, long distances, one from the other, and during a period of some 12 months. But, so far as the crime is concerned, when once established, they all were and became a single transaction, and in that view clearly admissible. Ought not the acts, conduct, and doings of each of the defendants—not their statements, declarations, or admissions necessarily, but what they or either of them may have done—in and about any material transaction forming a necessary part of the business in hand, whereby the Government was defrauded of its revenue, manifestly be submitted to the jury, with a view of determining the *bona fides* of their acts; that is, their intent in the premises? They should, of course, be the necessary incident of the litigated act, and such acts, incidents, and doings as are

necessarily and unconsciously associated with the crime as committed. **The fact that the circumstances attending a particular transaction, when so interwoven with each other and with the principal fact that they cannot be separated without depriving the jury of what is essential, may be submitted to the jury, seems now well recognized and settled.**

St. Clair v. United States, 154 U. S. 149, 14 Sup. Ct. 1002, 38 L. Ed. 936; Beaver v. Taylor, 68 U. S. 637, 742, 17 L. Ed. 601; Insurance Co. v. Mosley, 75 U. S. 397, 407-8, 19 L. Ed. 437; Clune v. U. S., 159 U. S. 590, 592, 16 Sup. Ct. 125, 40 L. Ed. 269; Wieborg v. U. S., 163 U. S. 632, 657, 16 Sup. Ct. 1127, 41 L. Ed. 289."

In the citations which Judge Waddill made, however, it does not appear that his attention was called to the case of *Wood v. United States,* 16 Peters, pages 358 and 362, in which Justice Story, speaking for the Court, said:

"Passing from this, the next point presented for consideration is, whether there was an error in the admission of evidence of fraud, deducible from the other invoices offered in the case. We are of the opinion that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to

establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.

"Indeed, it is admitted by the counsel for the plaintiff in error, in the case before us, that it is a general principle of law, that whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible proof. But the objections taken are, first, that when the proof was offered, no suitable foundation had been laid for its admission, and that the cause was launched with this proof; and secondly, that the proof related to importations *after, as well as before, the particular importation in question. We do not think either of these objections maintainable.* (Italics ours). The fraud being to be made out in evidence, the order in which the proof should be brought to establish it, *was rather a matter in the discretion of the Court, than of strict right in the parties.* It is impossible to lay down any universal rule upon such a subject. Much must depend upon the posture and circumstances of the particular case; and at all events if the proof be pertinent and competent, the admission of it cannot be matter of error. The other objection has as little foundation; for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party, as fraud would be, in the last importation, from prior fraudulent importations. In each case, the *quo animo* is in question, and the presumption of fraudulent intention may equally arise and equally prevail."

These rules and principles apply as well to the testimony of third persons as they do to parties litigant.

Much is said in the brief of counsel for plaintiffs in error of the damage done to the defendant Jones by reason of the testimony concerning the forwarding of the letters of the entrymen from Roots. But what were the accompanying facts and circumstances? What did the Court have to consider on the trial of this case? Well; we find that the Transcript of Record, page 972, discloses that Warren E. Hall was sworn as a witness and said that he was the postmaster at Siletz during the year 1901. This testimony is given in another part of the case and at another time than that of the postmaster concerning the forwarding of the letters from Roots; and he states that he knew two of the entrymen and that he ran a store at Siletz, and he testified that there was an *order left by Mr. Blauvelt in September,* 1902, together with a list of the persons whose mail was to be forwarded to Portland in care of W. N. Jones, and he was then asked to name the persons and he named them, and it was disclosed that a great many of the persons that he named were the entrymen *whose proofs were already in the case.* It naturally followed that, if these entrymen, taken to the claims as the evidence already showed that they were, by Jones or by Potter, *left even so personal a thing as their mail in the control of Jones in order that he might pick up the notifications from the Land Office or the letters from the commissioner, or whatsoever it might have been,* **Mr. Jones was pretty well informed and certainly consciously participated in the case.** Just as Potter was participating in the case by having

the letters addressed to the several entrymen who had made a protest to the Land Office, in the care of Thaddeus S. Potter, Chamber of Commerce, Portland, Oregon. Under what possible aspect of the case but that above given could the jury consider the only part of this testimony which so comes into this case? Not under an objection that it is the testimony of someone not authorized to bind Jones. Not under the objection, as now made, that it is the testimony of a postmaster without showing that Jones did or did not authorize him to forward such mail. But under objections *then made* that the statute of limitations shut out these proofs. Yet the proofs were in. The commutation affidavits were in, and the letters addressed to and from the Commissioner of the General Land Office were in. The previous state of the record prior to the admission of this testimony justified the acceptance of it.

It was certainly, therefore, competent to show the accompanying facts and circumstances to this jury in order that they might know how Jones and Potter could be readily advised at all dates and times, to even anticipate, as it appears from some of the affidavits, the rulings of the Commissioner, that they might make the proper showing to the Land Office in behalf of their several entrymen.

We have nothing to do with the arrangement of the bill of exceptions prepared by the counsel for the plaintiff in error. He prepared his bill of exceptions at his peril. Undoubtedly he prepared it well. But what possible excuse can there be for the proposition asserted and stated in the brief of counsel for the plaintiffs in error in view of the foregoing, in the following language: "Is

evidence of the acts of a third party not connected with the defendants admissible for the purpose of raising a presumption against them?" Note the word "presumption"; as well say inference; as well say collateral and connected facts. That is what the Courts say. Justice Story says that whenever a fraudulent intention is to be established collateral facts tending to show such intention are admissible proof, and this was stated by Justice Story in a case where the objections were almost identical to the objections in this case, as follows:

1st. That there had been no suitable foundation laid for the proof, and

2nd. That the proof related to matters occurring *after the particular transaction charged in the indictment and* that defendants could *not be bound by the acts of a third person.*

But Justice Story continued to say:

"We do not think any of these objections maintainable. The fraud being to be made out in evidence, the order in which the proof should be brought to establish it, was rather a matter in the discretion of the Court, than of strict right in the parties."

But suppose that Postmaster Michek testified before Hall, and suppose that the entire order of proof was reversed, and suppose that he did not remember having any talk with Jones, as stated in the brief of plaintiffs in error. The fact is that Jones got the mail; the record exhibits show it in the transcript and the testimony of the witnesses proves it and Postmaster Hall says he did it. Did what? *Forwarded the mail on the order of Blauvelt of all these entrymen to Jones at Portland.*

Now let us see whether the acts of independent third persons, considering from that standpoint a conspiracy case after connection has been shown, can be introduced in evidence.

The Circuit Court of Appeals for the Ninth Circuit, speaking through Judge Hawley, then sitting with Judges Gilbert and Ross in the case of *Dolan v. United States,* 123 Fed., page 54, says that when the connection of the person against whom the evidence is offered with the conspiracy is affirmatively shown, that any statement tending to show a conspiracy or to prove a collateral fact in connection therewith from persons to whom it was made is admissible against such party whose connection had been shown with such conspiracy. It happened in the Dolan case, however, in which Judge Hawley enunciated this rule, that the connection of the person against whom the evidence was offered with the conspiracy had not been shown.

See also The San Rafael, 141 Fed. 279.

Counsel attempt to maintain that evidence of this character is but presumption based upon presumption.

But this Court in the *San Rafael,* opinion by Circuit Judge Ross, October 16, 1905, speaking for the Court in 141 Fed. 279, said:

"We are of the opinion that the Court below was right in its conclusion that Alexander Hall was a passenger on the steamer San Rafael, and met his death by reason of the collision between her and the steamer Sausalito. To do so is not, as contended by the proctor for the appellant, *basing presumption upon presumption,* but it is the

drawing of the proper and logical inference from all the facts and circumstances disclosed by the evidence in the case. (Italics ours.)

"The objections on the part of the appellant to the declarations of Hall in respect to his intention to go to San Rafael, are not well taken. 'Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it.' Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. See, also, Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; Shailer v. Bumstead, 99 Mass. 120."

In *Connecticut Mutual Life Insurance Company v. Hillmon,* the Supreme Court considering the matter of a fraudulent conspiracy to cheat the Life Insurance Company out of insurance, in 188 U. S., speaking through Mr. Justice Brown, at page 219 said:

"In a conversation with one Wiseman, in February, 1879, Hillmon stated that he was going West on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for $25,000, the annual premium for which amounted to $600. There were various other items of testimony of

the same character, which the Courts below regarded as sufficient *prima facie* evidence of a conspiracy.

"Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though *she was not alleged to be a party to the conspiracy,* upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her."

Note that this evidence was allowed *"though she was not alleged to be a party to the conspiracy."*

In *Van Gesner v. United States, the Circuit Court of Appeals for the Ninth Circuit,* in 153 Fed., page 47, speaking through Judge Ross, said:

"Under such indictment, it was also competent for the government to show, by the persons who made such applications to purchase lands, that it was their intention and understanding at the time that the lands should be conveyed by them to defendants, contrary to their sworn statements and testimony."

The lower Courts have universally enforced this rule. See for instance *United States v. Francis,* District Court Eastern District of Pennsylvania, 144 Fed., page 520; likewise *United States v. Greene,* District Court Southern District of Georgia, 146 Fed. 793.

In that case entries regularly made in the books of a business concern contemporaneously with the transactions recorded and supported by the testimony of the employee who made them, were deemed admissible as evi-

dence of the facts therein shown on the trial of a criminal prosecution against third persons.

In the *Circuit Court of Appeals for the Eighth Circuit,* in the case of *Kansas City Star Company v. Carlisle,* Judge Thayer, speaking for the Court in 108 Fed., page 360, refers to that feature of the case where there was offered in evidence the substance of a conversation between the man who had stolen the cattle and one Gordon, but not in the presence or hearing of Carlisle. Circuit Judge Thayer says:

"This evidence, if it had been admitted, would have had a tendency to show that Carlisle, as well as Gordon, knew that certain cattle in the herd had been stolen, and that Gordon reported to White, but not in the presence of Carlisle, that Carlisle had said he 'thought he would be able to dispose of them, all right.' It is obvious that this conversation between White and Gordon, not in the presence of Carlisle, was only admissible upon the theory that at the time it was offered there was already sufficient evidence before the jury to establish a conspiracy between Carlisle, Gordon, and others to steal cattle, which made the declarations of any conspirator admissible against his fellow conspirators."

In *St. Clair v. United States,* not a conspiracy case, but a murder case, the Supreme Court of the United States, in 154 U. S., page 35, says in the syllabus:

"On the trial under an indictment charging that A, B, and C, acting jointly, killed and murdered D, without charging that they were co-conspirators, evidence of the acts of B and C are admissible against A, if part of the *res gestae.*"

In *Clune v. United States,* Justice Brewer, in the Supreme Court of the United States, 154 U. S. 590, declares the acts of persons not parties to the record are, in conspiracy cases, admissible against the defendants, if they were done in carrying the conspiracy into effect or attempting to carry it into effect.

See also Lincoln v. Claflin, 7 Wall, page 132.

In discussing the foregoing alleged exceptions it was necessary in the citation of these authorities to refer to many which go to the doctrine that in conspiracy cases evidence of other acts to show system, knowledge, design, motive and intent are admissible, and without again citing those cases, the leading one of which is the opinion of Justice Story in 16 Peters, page 359, we refer, in conclusion, to two others:

In the *Circuit Court of Appeals for the Sixth Circuit,* in the case of *Davis v. United States,* that Court had for consideration a like question and enunciated what the government contends to be the true rule in cases of this character, 107 Fed., pages 753 and 756:

"If, in a prosecution for conspiracy under such statute, the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, it is sufficient if it satisfies the jury beyond a reasonable doubt."

And the Court further said, page 756:

"The fourth point made is that the district attorney was permitted, over the objection of the defendant, to in-

troduce proof of other offenses, entirely separate and distinct from that for which he was on trial. The first specification under this head is upon the overruling of an objection to a question of the district attorney put to a witness, McDuffy, who was living nearby the plaintiff in error at the time when the officers attempted his arrest and Garner was killed. The question was, 'Did you know anything about George Davis having a still there?' to which the objection was made that it related to another violation of law, entirely distinct and separate from that for which the respondent was being tried. The objection being overruled, the witness testified that Davis did have a still there; that it was at one time east of his house, 'and then he had it on the west side.' We think it was competent to show the fact called for by the question. It was admissible to prove the object and purpose of the alleged conspiracy, and explain the motive of the respondent in entering into it, and in resisting the officers by firing upon them and killing one of their number. The objection was properly overruled."

Finally, in *United States v. Burkett,* the case cited by counsel for plaintiffs in error, we find District Judge Pollock announcing the following principle, which has the support of all the authorities hereinbefore cited and of other courts, 154 Fed., page 208:

"In a prosecution for conspiracy, it is not necessary to charge all the overt acts done or necessary to be done to render the object of the conspiracy effective, or to charge that the unlawful conspiracy proceeded to a successful determination as designed; it being sufficient that

the conspiracy, unless interrupted, might have accomplished its unlawful purpose."

See also *Sprinkle v. United States,* 141 Fed., page 816, quotation from which is given at length above.

On this subject the counsel for plaintiffs in error complain of an instruction refused by the Court and of the one given by the Court on the theory that the Court left it to the jury to find the defendants guilty upon the commission of other crimes than those charged in the indictment. (See their briefs, page 79.)

With that charity which should prevail among members of the bar and without any desire to become facetious, nevertheless it is a painful duty to point out that either the printer has made a mistake and counsel has overlooked the proof of the printer, for a very serious and important error has crept into their quotation of that portion of the charge which was actually given by the Court. If the Transcript of Record is examined at page 1072 it will be observed that the Court stated as follows:

> "As I have had occasion to advise you during the course of the trial, however culpable you may believe the defendants or any of them may have been with reference to any point testified to *but not* included in this indictment, etc."

while counsel's quotation leaves out the significant words **"BUT NOT"** before the words "included in this indictment," which when inserted and read in connection with the other portions of the charge, leaves these collateral facts *impossible of consideration by the jury for any other purpose than that of showing guilty intent, purpose, design or knowledge.*

In *Loder v. Jayne,* District Judge Holland, 142 Fed., page 1015, in respect to like instructions, states the following principles:

"These instructions, upon a review, we are convinced were properly given, and that the findings of the jury were based upon competent evidence. Many acts and declarations of the various associations, their officers, committees, members, and agents made in the absence of many of the other defendants in the case for the purpose of proving the conspiracy, were admitted before a *prima facie* case of conspiracy had been established and before the privity of some of the defendants had been proven. It is true that the rule in the admission of evidence in conspiracy cases is to require first the proof of a *prima facie* case of conspiracy before the acts and declarations of co-conspirators made in the absence of defendants are admitted against them, although the Court may, in its discretion, permit evidence of the declarations to be introduced out of its order, upon condition that it be afterwards followed by evidence of the conspiracy, and in some peculiar instances, in which it would be difficult to establish defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. Elliott on Evidence, vol. 4, Sec. 2939; Id., vol. 1, Sec. 249; Rice on Evidence, vol. 3, p. 904, Sec.

578d. All the evidence sought to be stricken out by the motion of defendants, which raised the question of the competency of this evidence, was of this character and clearly admissible. On the whole evidence, the combination and the privity of defendants were established by proof of facts personal to each connecting him therewith."

In *United States v. Greene,* in the District Court, District Judge Speer says in the syllabus, 146 Fed. 784:

"On the trial of defendants, charged with conspiracy to defraud the United States, evidence is admissible to show the state of mind of one charged as a co-conspirator with respect to the matters to which the alleged conspiracy related, prior to the date when it is alleged to have been formed.

"A letterpress copy of a letter purporting to have been written by an alleged co-conspirator of defendants on trial, found in his possession and shown to be in his handwriting, is admissible as original evidence to show his state of mind at the time the letter was written, where that may be material evidence in proof of the conspiracy, *without showing that the original letter was sent to the person to whom it was addressed.*" (Italics ours.)

Again, in further consideration of the case of *United States v. Greene,* 146 Fed. 789, Judge Speer says, on page 792:

"The object of this evidence is to show such joint action and mutual support on the part of Carter (who ought always to have represented the government) and the contractors whose interests were to the contrary, as would indicate an improper understanding and improper rela-

tions between these parties. The District Attorney states in his place that he purposes to show by other evidence that this joint and mutual support ripened and fructified into the conspiracy with which the accused now stand charged. Whether he succeeds in doing this or not, if it be true, as appears from the face of these letters and telegrams that Carter felt at liberty not only to call upon Greene and Gaynor, or either of them, for affidavits and telegrams denying an injurious charge which Curtis made, but that the relations between Carter and Greene were so close that he felt at liberty to dictate the telegram and the affidavits he wished Greene to make, it may tend to show a degree of intimacy between the alleged co-conspirators which is always material in evidence on charges of conspiracy or criminal joint action. Of course, the letters and telegrams are admitted because of what appears on the face of the papers taken in connection with the statements of the supplemental proof to be offered by the District Attorney."

In *Peters v. United States,* a case from the *Circuit Court of Appeals for the Ninth Circuit,* District Judge Hawley, with whom were then sitting Judges Ross and Morrow, declared for the Court as follows, 94 Fed., page 130:

"The rights of a defendant in a criminal case should, at all times, be carefully guarded. But courts must look at the substance, instead of the mere shadow, of the alleged errors. Courts should not be called upon to deal with 'trifles light as air.' We have carefully read all the testimony contained in the record, and have arrived at the conclusion that the evidence is sufficient to sustain the verdict of the jury. This being true, there must be

something legal, tangible, and real affecting the essential rights of the defendant to justify the Court in reversing the verdict of the jury. Error in law must be affirmatively shown. If the plaintiff in error has not been deprived of any substantial right; if he has not been misled; if he has not been prejudiced or injured in any respect—he has no real or substantial cause for complaint simply because the old forms and precedents have not been literally followed."

Counsel assert on page 128 of their brief that the action of the government officers as shown by the evidence was not a legitimate ground from which any inferences could be drawn by the jury and they put the question whether the acts of government officials as shown by the papers introduced in evidence are properly adducible for the purpose of placing before the jury inferences connected with the case.

This matter has been settled by the Supreme Court of the United States. An analogous instance was with respect to the matter of mailing certain papers through the United States Post Office establishment in the case of *Dunlop v. United States.* The Supreme Court in that case, 165 U. S., speaking through Justice Brown, decided as follows, pages 494 and 495:

"The testimony of both of these witnesses was objected to upon the ground that they testified nothing as to the delivery of these papers of their own personal knowledge. It is claimed that the error consisted in assuming that the papers, purporting to be the Dispatch, which McAfee testified that he found in his private box in the inspector's office, were deposited in that box by the clerk or messen-

ger, and then in permitting McAfee to testify that it was the duty of the clerk or messenger to take the mail from the post office and distribute the same in certain private boxes in the inspector's office. A similar objection was made to the testimony of Montgomery.

"It is unnecessary to dwell upon these assignments at any length. While the witnesses were not personally cognizant of the fact that these very papers were placed in their private boxes, it was perfectly competent for them to prove the customs of the post office, the course of business therein and the duties of the employees connected with it. If it were the duty of this messenger to take these papers from the office and deliver them in the private boxes of these witnesses, and the papers identified were there found, it would be proper for the jury to infer that they had been delivered in the usual way, after having been mailed at the post office in the city of publication. Both of these witnesses were government officers and testified as to the course of business in the respective offices with which they were connected. There was no error in permitting them to do so."

See also the case of

Grunberg v. United States, 145 Fed., page 81.

Touching also this aspect of the case in another particular it is asserted by counsel in their brief that there was no authority shown in Hobbs to administer an oath (See their brief, page 113). This was a matter of judicial notice. The exhibit No. 263, Transcript of Record, page 675, itself contains evidence that Hobbs was a special agent and for aught that appears to the contrary many of the papers introduced in evidence were so signed by Hobbs.

The Court therefore would have in mind the provisions of the Revised Statutes which in this respect are as follows:

"Sec. 183. Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose, shall have authority to administer an oath to any witnesses attending to testify or depose in the course of such investigation."

This brief for the government was more than half written and in fact nearly completed prior to the receipt of the paged and printed brief of counsel for plaintiffs in error. Perforce of all these circumstances and other business intervening, the writer has been compelled to discuss, by way of answer as it were, the various rules and principles which meet the several objections which counsel for plaintiffs in error assert.

There being, however, one hundred and sixty-three assignments of error, it has been assumed that counsel for plaintiffs in error will abide by those only which are discussed in their brief. If there had been specifications of errors printed in the brief of the plaintiff in error a more orderly arrangement could have been adopted in the construction of this answer.

It remains to present to the Court the general considerations upon the whole charge.

It is the rule in the Federal Courts that where the matter of specific instructions requested is substantially con-

tained in the whole charge, or that the charge, taken together as an entirety, substantially covers the several matters requested and the theory of the case submitted, the Trial Court is not under any obligations to charge in the particular language offered or to charge in accordance with the language of any particular Court.

Coffin v. United States, 162 U. S. 664, 672;
Dimmick v. United States, 135 Fed. 259;
Northern Pacific Railroad v. Urlin, 158 U. S. 271;
Grand Trunk Ry. Co. v. Ives, 144 U. S. 433;
Erie Railroad Co. v. Winter, 143 U. S. 74;
Ayres v. Watson, 137 U. S. 603;
Van Gesner v. United States, 153 Fed., 46 to face page 56.

Perhaps no more accurate case for comparison can be found embodying the essentials of a conspiracy charge with which in every particular the charge of the Court below compares, than that found in

United States v. Cole, 153 Fed., page 802,

which in fact is based upon *United States v. Goldberg,* Fed. Cas. No. 15,233.

As is well said by the Court in the *Ware* case, 154 Fed., page 585,

"As circumstances might have existed which would have rendered such declarations, admissions, or conversations admissible in evidence, as where they were repeated to and confirmed by the defendant, or where they were admitted without objection or exception by the defendant, or were introduced by the defendant, or were drawn out by proper cross-examination of his witnesses, counsel have failed by a mere exception to this portion of

the charge, without any request to exclude the specific evidence challenged, to overcome the *prima facie* presumption which always exists that the action of the Court below was right."

The entire charge of the Court in this case appears in the record at pages 1049 to the top of page 1078 and when it is read in its entirety it covers fully and fairly every question presented under the issues and theories of the prosecution and the defense. After the Court had explained the issues to the jury and defined a conspiracy it used this language:

"The statute of the United States read to you requires not only that it shall be proved beyond a reasonable doubt that such an unlawful combination has been entered into, and that it was to commit an offense as charged, but that one or more of the parties to the conspiracy has done an overt act to affect the object of the conspiracy. There is, therefore, something more required than a mental purpose to authorize a conviction in a case of this kind."

Transcript of Record, page 1056.

Then after instructing the jury upon the matter of the design we come to that part in which counsel for plaintiffs in error endeavored to make it appear, under their objection to the word "positive" (See their brief, page 134; Trans. of Record, page 1078), that the Court ought to have said "direct" evidence, and we find that the Court used the following language:

"Positive evidence entirely in proof of a conspiracy is not necessary to be had. From the nature of the case, the evidence frequently is in part circumstantial. So, though the common design is the essence of the charge, it is not

necessary to prove that all of the parties charged met together and came to an explicit and formal agreement for an unlawful scheme, or that they did directly by words or in writing, state to each other what the unlawful scheme was to be, and state to each other the details of the plan or means by which the unlawful combination was to be made effective; that is, it is not necessary that that should be shown by DIRECT EVIDENCE, etc."

Transcript of Record, page 1057.

But the Court, to make it doubly certain, subsequently used this language:

"The Government is not required to furnish *direct evidence* of the conspiracy or of the knowledge or intent of the defendants or either of them, but the conspiracy, knowledge or intent of the defendants may be established by circumstantial evidence *if sufficient* for that purpose."

Transcript of Record, page 1058.

Then the instruction was given, usual in all cases, depending upon circumstantial evidence. The Court positively instructed the jury that their deductions from the evidence must exclude every other hypothesis but the single one of guilt.

Transcript of Record, page 1059.

The Court then said:

"The presumption of law is that the defendants are innocent until they are proven guilty by competent evidence beyond a reasonable doubt."

Transcript of Record, page 1059.

The balance of the charge is concerned with the homestead laws and the laws under which the entries were to be made, the essential requirement among which is that of good faith, and finally submits to the jury the definite questions as charged in the indictment for their determination, telling them that that determination must be governed by the rules given them in the general charge together with that defining reasonable doubt. The Court, moreover, even instructed the jury that the contracts made by Jones, if under the circumstances explained he acted through and within compliance of the law, would not be sufficient to render him guilty; and takes up the very matter most complained of by counsel on the proposition that no part of the general charge covers the authority of Wells to act, but on this subject the Court said:

"By itself, if this were true, it would not be wrong unless it was a part of a plan to secure the title of the land by false and fraudulent proof of the homestead entry and settlement as alleged in the indictment, that is to say, THE DEFENDANT, JONES, WOULD NOT BE RESPONSIBLE FOR FALSE PROOF OF SETTLEMENT AND ENTRY IF HE DID NOT INTEND THEM OR AUTHORIZE THEM TO BE MADE."

Transcript of Record, page 1073.

After further instructions the Court then gave this instruction:

"Under the indictment, you may, as you find the evidence warrants, find all three of the defendants guilty, or not guilty, or that two of the defendants are guilty and some one of the defendants is not guilty."

Transcript of Record, page 1077.

It is obvious that the jury understood this charge in its entirety, for the obvious reason that they convicted Jones and Potter and acquitted the other defendant, Ira Wade.

In conclusion we reach the point on which counsel seem to bend their most strenuous effort. This matter is simply this: The government contended on the trial that the jury could find a conspiracy at any time from September 3, 1902, and prior to the commission of the last overt act, which was May 5, 1904, while the defendants contended that no conspiracy could be found by the jury unless the time was limited between the second and fifth days of September. The entire charge of the Court, Transcript of Record, pages 1070 and 1071, should be read in connection with the question presented at pages 140 and 143 of the brief of counsel for plaintiffs in error.

The plain fact is that the court's instructions submitted to the jury whether a conspiracy *existed* at all and then told them that if a conspiracy was entered into and *existed* at all they would have to go further and find beyond a reasonable doubt that the overt acts charged in the indictment were done by one or more of the defendants as charged for the purpose of effecting the object of the conspiracy. (Transcript of Record, page 1071.)

In other words, the proposition was this: You must first find that a conspiracy *existed*. Then you must go farther and find that pursuant to that conspiracy overt acts were committed. You must find these overt acts were committed while the conspiracy *existed*. And you must find all these facts from the evidence, satisfying your minds beyond all reasonable doubt.

We called attention in the prior pages of this brief to the expressions of the *Circuit Court of Appeals for the Fifth Circuit* upon this question. It is a *per curiam* opinion and a petition for a rehearing was denied. Judges McCormick, Shelby and Newman delivered the opinion in which they say, 152 Fed. 619:

"It need not be proven that the conspiracy was formed and begun at the date given in the indictment. THE ESSENTIAL POINT IS THAT THE CONSPIRACY *EXISTED* BEFORE THE DATE OF THE OVERT ACT ALLEGED AND CONTINUEED TO EXIST AT THE TIME THE OVERT ACT WAS COMMITTED."

As was said by this Court in *Dimmick v. United States,* 135 Fed., page 271,

"The charge of the Court not only covered every legal point involved in the case, but was in all respects clear and the language used was as strong and favorable in favor of the defendant as the law would warrant and bears evidence that the Court in its charge carefully guarded the rights of the plaintiffs in error."

In conclusion, an inspection of the record will disclose that the larger part of the Court's charge is made up of language contained in the requests of counsel for plaintiffs in error. They should not now complain because of the result.

ARGUMENT

We have so copiously quoted from authorities that little room is left for argument and considering the importance of the case the Court may be better satisfied to examine the authorities and deduce its own conclusion. But as the case is of great importance to the government it has been deemed a possible aid to the Court to point out some of the main features which might be forgotten or overlooked in oral argument.

Counsel for plaintiffs in error have consistently failed to appreciate, as it would appear, that they were trying this case in a Federal Court.

In the first pages of this brief we have called attention to *the rule that in criminal cases in the Federal Courts State laws and practice do not control and have no application.*

Having devoted considerable quotation of authority to the subject of the error assigned on *the motion to quash,* it suffices to point out here that it is deemed by counsel for the United States that the decisions of this Court in *Ball v. United States* and in *Shelp v. United States* are conclusive of the question there raised. So far as counsel for plaintiffs in error have based their ground upon citation of State cases, we conclude that the rules established by the decisions of the Ninth Circuit are controlling. It is not essential that all the witnesses called to testify shall be named on the foot of the indictment in a case of this kind.

This brings us to the *plea in abatement.* Under the *Cobban case,* 127 Fed. 713, it does not do to assert prejudice, but the facts from which the prejudice is claimed to

arise must be shown. Counsel filing the plea doubtless endeavored to do this, but a plea in abatement in no respect negatives the fact that *the necessary number of jurors required under the Federal Statutes* to concur in the finding of the indictment *did in fact concur* in the indictment filed in this case; and it seems to us that is an end of the question. Irregularities, if there are any, at this stage of the case have been cured by the verdict. The Federal Statutes so state, for it must be something beyond mere defect of form and something which operates to the substantial prejudice of the defendant before the Appellate Court after verdict and judgment rendered will interfere. In conclusion on this point it is to be noted that nowhere in the plea does it appear that there was any final adjournment of the Court of which the grand jury returning the indictment was at that time the arm. Hence there was no objection to their meeting and adjourning at their convenience. There being no other points presented in the argument or plea, we conclude that this assignment of error is not sufficient to interfere with the judgment.

Next for consideration arises *the demurrer to the indictment,* to which indeed we have devoted the most searching examination and the most prodigal citation of authority to aid the Court in its conclusion. There is only left to say, in connection with the authorities hereinbefore cited, that this indictment charges the following apparent, plain facts and circumstances constituting the offense and within the authorities it is certainly sufficient:

This indictment naming the plaintiffs in error together with others, alleges and charges among other things:

I.

THAT THE PLAINTIFFS IN ERROR ON THE 3D DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT, DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

III.

Those certain portions of its public lands situate, lying and being within the State and District of Oregon *which were open to homestead entry under the land laws of the United States AT THE TIME the respective homestead filings hereinafter mentioned were made thereon* at the local land office of the said United States at Oregon City in said State and District of Oregon.

(Here follows a description of the land, together with the names of the entrymen who made such homestead filings and the date upon which such filings by such entrymen were made.)

Transcript of Record, Pages 14, 15 and 16.

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants, Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESIDENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID

LAND SO FILED UPON BY HIM FOR THE PURPOSE OF SPECULATION AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

Transcript of Record, page 18.

VII.

(1) AND THAT IN PURSUANCE OF SAID CONSPIRACY AND TO EFFECT THE OBJECT THEREOF SAID DEFENDANTS JONES AND POTTER DID CAUSE AND PROCURE DANIEL CLARK TO MAKE A HOMESTEAD PROOF,

Transcript of Record, pages 19, 20 and 21.

AND A FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS,

Transcript of Record, pages 23 and 24.

AND THAT THE DEFENDANTS AND EACH OF THEM WELL KNEW THAT THE HOMESTEAD PROOF SO SUBSCRIBED BY CLARK AND HIS ANSWER TO QUESTION NUMBER 5 THEREIN WAS FALSE IN THAT CLARK NEVER RESIDED UPON THE LAND AT ALL.

(2) That Ira Wade on the 5th day of September, 1902, certified to the foregoing testimony of Clark.

Transcript of Record, page 25.

(3) That on the 5th day of September, 1902, the defendants Jones and Potter caused, induced and procured Addison Longenecker to make final proof before Wade,

Transcript of Record, pages 25, 26, 27, 28-30.

and that said defendants Jones, Potter and Wade and each of them well knew at the time such homestead proof was so subscribed by Longenecker that his answer was false to question number 5, and that said Addison Longenecker had never resided upon said land at all.

(4) That on the 5th day of September, 1902, Ira Wade certified to the foregoing testimony of Longenecker.

(5) That defendant Willard N. Jones on the 5th day of May, 1904, did cause and procure the following letters and affidavits to be sent to the Secretary of the Interior by Charles William Fulton, there and then the duly qualified and acting United States Senator for the State of Oregon, setting out the said letter of Fulton

Transcript of Record, page 32.

the letter of Jones dated April 23, 1904, referred to in the Fulton letter of May 5, 1904,

Transcript of Record, pages 33 to 39.

the agreement between Jones and the entrymen,

Transcript of Record, pages 39 to 42.

attached to which there will be observed a confirmatory affidavit sworn to by Jones before George Sorenson under date of the 23d day of April, 1904, in which Jones, a plaintiff in error, makes the following statement of fact:

"THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE FULL AGREEMENT SIGNED BY ADDISON LONGENECKER, DANIEL CLARK AND GEORGE F. MERRILL AND THAT THERE WAS NO OTHER VERBAL OR WRITTEN AGREEMENT EXPRESSED OR IMPLIED WHEREBY THEIR HOMESTEAD CLAIMS WOULD INURE IN WHOLE OR IN PART *TO ME,* EXCEPT AS IS STATED IN THE FOREGOING AGREEMENT."

Transcript of Record, page 43.

The indictment then concludes with the usual charge against the peace and dignity, etc., signed with the proper

officers AND WITH THE NAMES OF THE WITNESSES ENDORSED THEREON.

Furthermore, as we have pointed out, at this stage of the case an indictment receives a liberal construction and after a verdict it receives the aid that results from the consideration of twelve men who determined upon the evidence introduced thereunder the truth of the facts charged therein. It is not the question that the indictment could have been better; it is not the true test that it might probably have been more certain and definite. But now it is the consideration whether substantial justice has been accomplished; *whether the substance of the crime could adequately be understood from the indictment;* whether the defendants went on trial with that understanding, and whether after full consideration of all its clear and substantial averments it puts before the defendants substantially the charge which they were called upon to meet. The evidence in this case showed a detail of facts and circumstances involving both the plaintiffs in error—involving them separately and collectively. *These facts and circumstances were clearly referable to a preconceived design of the actors.* The jury has said that there was a moral probability that these facts and circumstances would not have occurred without a preconcertive action and *the jury have said that beyond a reasonable doubt they are satisfied that the conspiracy alleged in the indictment was formed and conducted as alleged.*

Peters v. United States, 94 Fed. 130.

Van Gesner v. United States, 153 Fed. 46.

It is the essence of the thing in the administration of justice. When the indictment advises the defendant with

reasonable certainty and fairness what he is charged with, it fulfills all the requirements of the law. Perhaps more could have been set forth, but enough was said to apprise the defendants so they could make a defense. They did make it. The jury did not believe it.

In final analysis, the *general features of the case* can only be incidentally considered. There are so many phases of the case raised by the assignments of error, that we must again invite attention to the fact that without specification of the errors in the brief we could not be expected to meet all the branches of the case. We must ask that counsel be confined to matters specifically referred to in their brief only. This done we turn to those cases cited by counsel on the subject of the statute of limitations.

United States v. Owen, 32 Fed., and *United States v. McCord,* 72 Fed., together with *Ex parte* Black, 147 Fed., are the cases relied on by counsel for plaintiffs in error to establish their view of the application of the statute of limitations to the *"statutory offense of conspiracy."*

The first case was decided by Judge Deady at a time and under circumstances when very little attention was given to the conspiracy statute or to cases arising thereunder. *United States v. Dence,* in 3 Woods, and *United States v. Donau,* 11 Blatchford, then, together with *United States v. Goldberg,* 14 Meyer Fed. Dec. 41, 42 (Fed. cases 15,233) were extant and sound law, yet they were not considered; perhaps not even searched for. There was no effort in the earlier cases to consider authority. Each judge seemed to start with the doctrines of common law conspiracy and concluded thereon as it suited him or the case without regard to the *offense* characteristically desig-

nated as a "statutory offense, containing elements additional to common law concepts of conspiracy."

When the Ware (Marie Ware) and Puter cases came on before our now revered Judge Bellinger, then sitting as District Judge, counsel for defendants made great effort to establish the principles of *United States v. Owen* as the law. But Judge Bellinger had read. He knew. In the Puter cases he refused to follow Judge Deady. He held that the statute did not run as claimed, but if at all from the *last overt act only.* Judge DeHaven, at first, was not clear on this view, although sitting in this district; but *United States v. Brace,* 149 Fed. 874, is clear to the point that he changed his mind, as great jurists occasionally do, and adhered to the view of the law more in consonance with sound principles and the weight of authority.

It is also to be remembered that from the time of the *Owen* case, that the *"statutory offense of conspiracy"* was more frequently prosecuted, in respect of its feature *"to defraud the United States in any manner or for any purpose."* So, by the time the first conspiracy cases were in 1904 brought on for trial in Oregon there was a well defined channel for legal thought to mold and deepen to a strong river of authority before it was dried and cracked by archaic contemplations of a common law crime applied to a more modern statutory offense with added elements. So, the jurists set their respective vessels afloat. The result, from *United States v. Greene,* in 115th Federal to *Ware v. United States* in 154th as we find the cases now, runs concurrently through thirty-nine (39) volumes of our Federal Reporter without so much as a break among the different *Circuit Courts of Appeals* throughout the many

circuits from which we have picked the cases. And this trend of authority is fixed and fastened in approval and affirmance of the opinions of District and Circuit Courts in the several circuits below who had the courage to remain convicted to sound principle.

The Bunn decision in *United States v. McCord,* as well as *Ex parte Black* are now both before the Circuit Court of Appeals for the Seventh Circuit in the two appeals prosecuted there recently from the decision of Judge Quarles in 147 Federal in the Black case. The writer has just presented these cases in that Court of Appeals with the confident expectation that Judge Grosscup and his associates will declare the law as contended for here, and as already declared in this circuit. The *Ware* case was decided since these appeals were taken in the Black cases, and the sound doctrine of that case, coupled with the Bradford case, should go far to annul the subtleties of reasoning based on common law doctrine applied to a statutory offense which is *sui generis* in the law.

The McCord case came up from Wisconsin before Judge Bunn and to show the circumstances surrounding this decision to which counsel in other Government cases attach importance we quote a characteristic remark:

"In this case there was an indictment against Warren E. McCord and others charging that on the 23d day of October, 1891, they unlawfully conspired together and with divers other persons to defraud the United States of its title and possession and dominion over certain unappropriated lands belonging to the United States, which were fully described in the indictment. The case was tried before a jury, and was elaborately and thoroughly

argued by able counsel for both sides, Mr. Briggs and Mr. James G. Flanders representing the United States, and Spooner, Sanborn, Kerr & Spooner, Charles Felker and Lamoreaux, Gleason, Shea & Wright for defendants."

(Quotation from brief of appellees in Black cases appealed).

Wisconsin has been denuded of its timber. Titles passed in that state on receivers' receipts, as accustomed to do for some years in a few other states. If an entry, however fraudulent, reached that stage, its purpose was accomplished, for purchasers accepted the titles. There was reason therefore to cut off a conspiracy case *as close up to the entry as possible.* If counsel could prevail upon the court by the influence of their standing and reputation, their subtlety and their metaphysics to such a result it was to prevent wholesale prosecution in Wisconsin for the denudation of the landed empire of the people of the United States.

Bolstered up with the McCord case doctrine the Wisconsin dealers in timber then sought, through their local representatives and by themselves, with avaricious audacity the virgin forests of Oregon, and the results occupy a page in the annals of Oregon's historical commercialism only interrupted by the land fraud prosecutions. But for these, Oregon would be the photograph of Wisconsin.

As in the Black cases, so here, we are contending for the enunciation of a doctrine which at least in this circuit will forever quiet false doctrines and opinions of necessity against the interests of the whole people.

In the case at bar same argumentative objection has been made by plaintiffs in error on the admission of evi-

dence of a character denominated by them as *"trifling"* and *"as immaterial to the charge in the indictment."*

We have at length pointed out in previous remarks grounded on authority of cited cases the doctrines bearing upon "collateral facts" as evidence received in a case of this character. To the point last referred to, however, we give as authority the rules announced by the Supreme Court.

In *Holmes v. Goldsmith,* 147 U. S., page 150, a case which went up from the District of Oregon to the Supreme Court of the United States, and was argued by John H. Mitchell for plaintiffs in error, and by L. B. Cox for defendants in error, the Court, speaking through Justice Shiras, said, at page 164:

"That Owens could, in the opinion of the expert, have as readily counterfeited the handwriting of Jones as that of the defendant Holmes seems to be fanciful and entitled to little or no weight. If these offers had been rejected by the court, such rejection could not have been successfully assigned as error. Still we cannot perceive that the case of the defendants was injured by the admission of this trifling evidence. As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend,

even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

On similar considerations the *Circuit Court of Appeals for the Eighth Circuit* enunciated the same doctrine and applied it to a conspiracy case, in *Olsen v. United States,* 133 Federal 849.

See the opinion of the Court at pages 854 and 856 and 857 of the 133d Federal.

From the very nature of the statutory offense of conspiracy *results the conclusion* that in and of itself it consists of a series of acts set on foot by the agreement impulse or intermittent force of design originally conceived.

Much more is this so under the law as it stands. For we have not only the essentials of a common law conspiracy, mutual assent, conscious participation, in a word, the "conspiring" coupled with the purpose sought, *but we also have the additional statutory requirement before a prosecution can be had,* all acts done by either or any of the parties to call into execution and effect the ultimate purpose conceived.

The most fruitful source of nicety of distinction, subtlety of argument and technicality of presentation consists in

constantly referring to Section 5440 as if it comprehended common law conspiracy only. But it seems that a more happy terminology might be used by designating Section 5440 as **"the statutory offense of conspiracy."** So considered, *the offense consists of the original plot and design and the acts done by either of the parties to carry it into execution.* Otherwise no prosecution can be had. It is the offense that the statute defines. The component parts of it cannot be justly severed and an argument fairly based upon the doctrines of common law conspiracy alone. The common law conspiracy has been changed by the statute of the United States. It must therefore be immaterial how long a time the performance of acts may continue so long as the acts in question go to the ultimate accomplishment of the original design, however remote its end.

So, by the very nature of things entering into its makeup, the statutory offense of CONSPIRACY is continuous and is a continuing offense. Its process of execution is manifested by overt acts.

As pointed out in the *Newton* case, hereinbefore cited, guilty participation ensues from the very fact of antecedent acts performed in contemplation of the ultimate design and understanding which thereby ripens the statutory offense prescribed by the law.

It is familiar law that it is immaterial whether the conspirators gain any pecuniary object. It is also immaterial whether the object of the conspirators is attained. Whether, indeed, anything is accomplished or not. Suffice it to satisfy the statutory essentials that there has been a plan "to defraud the United States in any manner or

for any purpose," and an act committed in furtherance of the design.

Counsel for plaintiffs in error would have us believe that the Government was in no way deceived, but, as has been pointed out, some of the very entries referred to upon page 77 of their brief were actually commuted entries and the commutation was availed of under the law of January 26, 1901. In the *Stearns* case, hereinbefore cited, it was pointed out that even to secure the entry by feint of complying with the law was to secure that entry fraudulently and therefore to defraud the United States. In the *McGregor* and *Curley* cases it is made clear that even to interfere with the administrative operations of the Government is a fraud upon the United States. Judge Parlange, in the part of his opinion which we have hereinbefore quoted, says, referring to the statute:

"It uses the broadest possible language, it punishes all "who conspire to defraud the United States 'in any man-" 'ner and for any purpose.' It is certainly just as import-"ant that the Government should not be defrauded with "regard to its operations even if no pecuniary value is "involved as that it should not be defrauded of its prop-"erty."

If this is not the law, why do courts constantly reiterate it? In the *Ware* case Circuit Judge Sanborn, as shown by the quotations hereinbefore made, points out that the purpose of the homestead laws is to induce settlement and cultivation and that any agreement comprehending a division of the estate which the homestead applicant is to acquire is inconsistent with the purpose and spirit and violative of the provisions of the laws of the United States.

In fact he stamps these agreements as contracts to make the applicants but the mere agents for others who do not desire the lands for homestead purposes at all. (See 154 Fed., page 584). Judge Van Devanter lucidly discusses the same proposition and stated for the Court that he could not assent to the contentions made there for the plaintiffs in error, which are the same contentions identically as are made here, namely, that the United States has not been deceived.

As before stated, all of the evidence is not in the record. *It must therefore be presumed that there was other and equally important and convincing evidence before the jury.* From so much of the evidence as is in the record it is morally certain, as shown in previous pages of this brief, that there was joint assent of the minds of Jones and Potter and Wells and others, and a conscious participation on the part of both Jones and Potter in the *purpose* upon which they engaged and the *means that they employed to execute it.* There is no escape from this proposition. Counsel for plaintiffs in error attempt to excuse this by now saying, "Well, but there was no guilty assent or guilty participation; if they did participate in everything that was done, the United States was not deceived." This fallacious argument seems to be based upon the fact of the alleged requirement of three years' actual residence to obtain these lands on the Siletz. But an inspection of the entries which they have cited and an examination of the record show that a great many of *the claims were commuted.* More importantly does it appear that they first attempted to avail of the deductions in time for "actual residence" which would ensue under the soldiers and

sailors provisions of the homestead law. When it was ascertained that the Commissioner would not allow such deductions, what then was the next available step under the acts whereby they could shorten such term of residence? *Why, it was commutation.* It is evident that this was availed of. In the brief of plaintiffs in error we find the following citations:

"The proof of James Landfair, Govt. Ex. 127, page 473, shows that he established residence in October, 1900, filed June 18, 1902, and made final proof September 2, 1902."

"The proof of Louis Paquet, Govt. Ex. 142, page 499, shows that he settled on the land on November 15, 1900, and it appears from the indictment that he filed on the same on the 3d day of October, 1900."

"The proof of William T. Everson, Govt. Ex. 344, page 792, shows that he settled upon said land in October or November, 1900, that he filed upon the same March 2, 1901, and final proof made September 2, 1902."

How could a man settle in 1900 and prove up in 1902 under the homestead act? How can a man file in 1902 and prove up the same year under the homestead act without previous residence for the time required by the act? These questions answer themselves.

From an examination of the exhibits in the record and the various entries comprehended in them it will be observed that act after act was committed within three years of the time charged in the indictment, but notwithstanding, counsel for plaintiffs in error contend that if the conspiracy was started precedently three years prior to the indictment and a single act in aid of its object committed, then the offense was barred, or, in other words,

there was no offense. But it is through the repetition of such acts—"overt acts, as they are commonly called"—"A CONSPIRACY IS MADE A CONTINUING OFFENSE. BY EACH SUBSEQUENT ACT IT IS REPEATED AND ENTERED INTO ANEW."

United States v. Brace (Judge DeHaven), 149 Fed. 875.

This Court had practically the same contentions before it in the *Van Gesner* case (153 Fed. 46) in respect of objections to evidence and rulings thereon.

This Court held that evidence of other acts disconnected with the conspiracy charged in the indictment was admissible for the purpose of showing knowledge, intent, system, design and motive.

This Court in that case moreover held that acts connected with the matter charged in the indictment were competent overt acts, whether alleged or not, referable to the joint design and a renewal of the original conspiracy.

So, in the *Van Gesner* case, this Court in effect reached the same result as the *Circuit Court of Appeals for the Fifth Circuit* in Bradford v. United States, 152 Fed. 19.

If the jury were satisfied that a conspiracy *existed* at any time an overt act charged was committed, then the offense was complete, and the verdict was justified. If the conspiracy did in fact *exist* before the commission of any overt act charged, then it follows the jury finding that fact in existence looked farther to find if it continued to exist at the time of the commission of acts charged as an overt act. That is only to say was the conspiracy then alive. *"Continued"* in fact is one thing. *"Continued"* in its other aspect is a matter of law. We are dealing here

with continuation as a series of facts. We have shown herein under the authority of many cases that *all* acts as overt acts committed or done in furtherance of the conspiracy need not be alleged.

This discussion would not be complete without calling attention to the doctrine counsel for plaintiffs in error advance against this indictment in this case based on their discussion of *"means."* To thoroughly view this question without cavil we must ask the Court at the expense of repetition to look again at the indictment in the following particulars:

I.

THAT THE PLAINTIFFS IN ERROR ON THE 3D DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT, DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND

FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESIDENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID LAND SO FILED UPON BY HIM **FOR THE PURPOSE OF SPECULATION** AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

In addition to the matters offered in the discussion of the authorities on the subject of "means," within the above cited particulars the following considerations suggest themselves.

"Speculation." The indictment charges that the plaintiffs in error *well knew* that each of said respective entrymen was entering said land so filed upon by him for the *PURPOSE OF SPECULATION,* and not in good faith to obtain a home for himself.

To defraud the United States is of itself a *"criminal and unlawful purpose."*

It is only where the purpose sought is not of itself criminal and unlawful that the means must then be set out, and such means must be criminal or unlawful.

It may be true that to obtain a homestead is a commendable pursuit and altogether lawful. But to defraud the United States to obtain a homestead is certainly unlawful. To make an entry for *speculation* and not in good faith to obtain a home is against the law.

It is a specious, nice and subtle argument which then puts forth and attempts to engraft the requirement that it is *then* the unlawful means which constitutes the crime.

"In law what plea so tainted or corrupt,
"But the sound of a gracious voice doth obscure the show of evil?"

Counsel have even misquoted the allegations of the indictment. They use the indefinite expression as a quotation, *"certain entryman."* (Their brief, supposed page 28). More particularly *"by causing and procuring certain entrymen to make false proof of settlement and improvements."* The indictment, however, says, see paragraph IV, division "Argument" this brief (Transcript of Record, page 18), where the record is copied:

"By causing and procuring said respective entrymen," etc. This is a definite class, named in the indictment. *"Certain entrymen"* exhibits indefiniteness of statement and want of certainty. The indictment describes the very entryman in each instance and specifically refers to them thereafter as *"said respective entrymen."* A terminology singularly specific and definite in a case of this character.

The pleader under the statutory offense of conspiracy has several different methods of charging the crime open to him. (1) To defraud the United States in any manner or for any purpose. (2) To commit an offense against the United States. This latter in turn is and may be divided into as many points of attack as the facts in question involve or comprehend violation of the laws of the United States. Perjury, subornation, forgery, bribery, customs and revenue violations and so forth. In these respects the mind cannot conceive of a crime involving common law essentials which would not involve unlawful means or criminal means in its commission. So with more or less exactness the means, depending upon the circumstances of each case of this independent criminal character of *itself* must appear.

But in a proceeding to reach facts such as were disclosed in the *Curley* and *McGregor* cases, where the United States is defrauded in any manner or for any purpose, the very fact of such purpose as the design and conception of the plot and plan *renders such purpose a criminal purpose* under the statutory offense of conspiracy, and "means" cease to become material. The very purpose is criminal if from what is stated of it, it is "to defraud the United States in any manner or for any purpose."

This indictment as pointed out charges the purpose of the plan and combination

"KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE UNITED STATES."

That was the purpose. The "means," and the only means then which are thought of is: How was this to be accomplished?

But we do not under the cases find one which requires the indictment to show accomplishment, or that the conspirators could or did succeed, or that any benefit would result. On the contrary, it is found in such a case to be immaterial whether the plan was effective or not.

Even in the case where a substantive crime is involved in the plot, or in the means of accomplishment in a proper case, it is held that the pleader is not required to set out the particulars of that crime with the degree of certainty and exactness required in an indictment for the crime itself.

United States v. Wilson, 60 Fed. *supra;*
Ching v. United States, 118 Fed. *supra.*

A fortiori, then, where the statute itself creates the offense of conspiring to defraud the United States, the facts alone which with reasonable fairness and certainty inform the defendant of that charge and of matter sufficient to show his conscious participation therein, satisfy every requirement prescribed by law.

On the whole case it is therefore submitted no substantial right of the plaintiffs in error has been denied, nor has any action or ruling of the trial court operated to their prejudice. They have had a fair trial on an indictment in the essence of things fully and fairly apprising

them of the charge which they were called on to meet. With all the ingenuity and art of able counsel they exhausted every step to prevent an issue of fact, but finally pleaded "not guilty," and on that issue went to the tribunal with all their capabilities alive to their defense. The jury found them guilty as charged. Now after verdict every reasonable presumption is indulged that the verdict was right; and confident that exact and substantial justice has been done we submit the case finally to this Court expectant of a judgment of affirmance.

Respectfully submitted,

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Portland, Oregon, October 28, 1907.